No. _____

In The

Supreme Court of the United States

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION,

Petitioner,

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN
RESERVATION; JOSEPH PAKOOTAS; WENATCHI
CONSTITUENT TRIBE; JOHN ST. PIERRE,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 24 of the Restatement (Second) of Judgments uses a pragmatic transactional test for determining whether a party's claim is precluded by *res judicata.*

2. Whether the opinion of the court below, that the Colville Tribe's present claim in this case regarding off-reservation Indian fishing rights is not barred by *res judicata,* is in direct conflict with the Restatement (Second) and the rulings of other circuit courts.

3. Whether the respondents are judicially estopped from assuming factual positions in their present claim for off-reservation Indian fishing rights that are inconsistent with the undisputed facts of their previously litigated claim, thereby giving them a full and fair opportunity to litigate this claim in a prior suit.

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PETITION FOR A WRIT OF CERTIORARI

The Confederated Tribes and Bands of the Yakama Nation respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court below (App. A *infra* 1a) is reported at *U.S. v. Oregon*, 470 F.3d 809 (9th Cir. 2006). The opinion of the District Court (App. B *infra* 20a) is unreported. There is also one prior District Court judgment and an affirming opinion by the court below that bear directly on the issues before this Court. They are reported respectively at *U.S. v. Oregon*, 787 F.Supp. 1557 (D.Or. 1992) and *U.S. v. Oregon*, 29 F.3d 481 (9th Cir. 1994).

JURISDICTION

The court below entered its judgment on December 4, 2006. A Petition for rehearing *en banc* was denied by the court below on February 28, 2007 (App. C *infra* 37a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court has had continuing jurisdiction over this case since 1968 under 28 U.S.C. § 1345.

RESTATEMENT (SECOND) OF LAW INVOLVED

The jurisdictional issue in this case involves the application of Restatement (Second) of Judgments § 24 (1982), which is also set forth at App. D *infra* 39a. The Restatement provides as follows:

§ 24 DIMENSIONS OF "CLAIM" FOR PURPOSES OF MERGER OR BAR – GENERAL RULE CONCERNING "SPLITTING"

1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

TREATY PROVISIONS AND RELATED AGREEMENT INVOLVED

The substance of this case involves the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951). The Treaty is set forth in full in App. E *infra* 40a-49a. The specific provisions of the Treaty at issue in this case are as follows:

ARTICLE III.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said

confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE X.

And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Also at issue in this case is a related agreement between the Yakamas and the United States, ratified by Congress subsequent to the Treaty in 1894, known as the "Wenatshapam Agreement" or "1894 Agreement" (28 Stat. 320). The Agreement is set forth in full at App. F *infra* 50a-54a. The relevant provisions are as follows:

ARTICLE I.

The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of in, and to all their right of fishery, as set forth in Article 10 of said treaty aforesaid, and also their right, title, interest, claim, or demand

of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.

ARTICLE II.

After the ratification of this agreement by Congress and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law.

STATUTORY PROVISIONS INVOLVED

This case also involves § 4 of the General Allotment Act, 25 U.S.C. § 334, which is set out in full in App. G *infra* 55a.

STATEMENT OF THE CASE

A. *U.S. v. Oregon* and the First Colville Claim

The present case was filed in the District Court in 1968 by the United States against the State of Oregon on behalf of the petitioner Yakama Nation and other Indian tribes. The main purpose of the litigation was to determine the treaty rights of the tribes to fish at all "usual and accustomed places" on the Columbia River and its tributaries in the wake of this Court's decision in *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968). In 1969 the case was consolidated with *Sohappy v. Smith,* 302 F.Supp. 899 (D.Or. 1969) in which the Hon. Robert C.

Belloni ruled that Oregon's authority to regulate Indian treaty fishing was limited to the non-discriminatory conservation necessity outlined in *Puyallup*. The Yakama Nation and three other tribes, the Confederated Tribes of the Umatilla Reservation, the Confederated Tribes of the Warm Springs Reservation, and the Nez Perce Tribe, intervened as plaintiffs. Judge Belloni retained jurisdiction over the case to allow the parties to seek relief when necessary to enforce the District Court's decree. Subsequently, the District Court permitted the State of Washington to intervene in 1974, and the State of Idaho followed suit in 1983. In 1977 the parties stipulated to, and the District Court adopted, a five-year conservation management plan for the Columbia Basin. This plan expired in 1982, but a modified plan was approved by the parties and adopted by the District Court on October 7, 1988.

In 1989, over two decades after the case was filed, the Respondent Confederated Tribes of the Colville Indian Reservation (hereinafter "Colville") moved to intervene, asserting that some of its constituent tribes had retained rights reserved in 1855 by both the Yakama and Nez Perce treaties. A successful intervention would not only have permitted Colville to participate in all proceedings of this case, but also would have presumably allowed Colville to regulate fishing by members of those constituent tribes at all usual and accustomed places. See *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974). The District Court granted Colville's motion to intervene on the condition that it first must establish that it has off-reservation fishing rights secured by treaty. After trial, the District Court, Hon. Malcolm F. Marsh presiding, concluded that Colville had not retained such rights because the constituent bands that were signatories to the Yakama and Nez Perce

treaties, including the Respondent Wenatchi Tribe, had voluntarily moved to the Colville Reservation and refused to be bound by those treaties. The Court emphasized that these groups now comprise a minority of Colville tribal members, and "to accept the argument urged by Colville would result in the majority benefiting from the treaty rights of a minority with a resulting proportionate loss of fishing rights" by the Yakama Nation and Nez Perce Tribe. *U.S. v. Oregon,* 787 F.Supp. 1557, 1570 (D.Or. 1992). The court then dismissed Colville's motion to intervene. *Id.* at 1572. On appeal, the court below affirmed the decision. *U.S. v. Oregon,* 29 F.3d 481, 486 (9th Cir. 1994).

Important to the decisions of both courts was the undisputed fact that Colville is "the only entity that can legally act on behalf of its members." *U.S. v. Oregon,* 29 F.3d at 483. This meant that any off-reservation fishing rights claimed by the constituent tribes could only be asserted by the Colville Tribe as a whole.[1] This foreclosed any possibility that the Wenatchi Tribe could claim any such rights on its own. Moreover, Colville agreed to the following factual findings by the District Court regarding the rights of the Wenatchi Tribe:

> 21. In 1896, the United States Government purchased the lands of the Wenatshapam Fishery reserved under Article X of the Yakima Treaty. The funds from that purchase were used to develop the Yakima Indian Reservation irrigation project and to provide direct payment to Wenatchi Indians who lived at or near the

[1] The tribal government of the Colville Confederacy was established in 1938 under the Indian Reorganization Act, 25 U.S.C. § 476. *U.S. v. Oregon,* 29 F.3d at 483.

> Wenatshapam Fishery. The agreement for the purchase of the Wenatshapam Fishery also included provision to allot the Wenatchi Indians living at or near the sale of the Wenatshapam Fishery in the area of the fishery on the Wenatchee River.

U.S. v. Oregon, 787 F.Supp. at 1580. All of these facts later became the subject of controversy despite their establishment through a final judgment on the merits.

B. Proceedings Below In the Present Colville Claim

In May 2003, nine years after the Colville motion to intervene was dismissed by the District Court, a group of enrolled Colville tribal members appeared at Icicle Creek, a tributary of the Wenatchee River in Central Washington, and began fishing near the Leavenworth National Fish Hatchery.[2] The fishermen claimed that they were asserting off-reservation fishing rights as members of the "Colville Wenatchi Tribe," but did not produce any judicial decree validating such rights. The Yakama Nation then sought injunctive relief in the District Court against the Confederated Tribes of the Colville Reservation, maintaining that all Colville members were precluded from fishing at Icicle Creek by the court's 1992 dismissal of the Colville intervention in this case. Yakama argued that Colville had, in its previous proceeding, fully and completely litigated this matter and had no off-reservation rights under the court's rulings.

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[2] The hatchery, which releases spring chinook and coho salmon into Icicle Creek, is operated by the U.S. Fish and Wildlife Service.

Colville countered by claiming that it was presenting a "new theory" of the case, this time based on rights allegedly secured to the Wenatchi Constituent Tribe by an 1894 agreement between the Yakama Nation and the United States. This agreement, which was ratified by Congress, had its origin in Article X of the Yakama treaty. By claiming that the Wenatchis' fishing rights were not actually "treaty" rights, Colville hoped to avoid a ruling that its claims were barred by *res judicata.* In doing so, Colville was forced to renounce several of the facts that were established by its own admission in the first case.

The District Court, Hon. Garr M. King presiding, disagreed with Colville, ruling that the tribe could have made this new claim in the prior case, but chose not to. App. B *infra* 30a-31a. As a result, the court held that Colville's claim was precluded by its previous failure to intervene as a party in this case, citing the holding of the court below in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency,* 322 F.3d 1064 (9th Cir. 2003). App. B *infra* 33a. Petitioner's motion was granted and the Wenatchi Tribe was permanently enjoined from fishing at Icicle Creek.

On appeal to the court below, Colville continued to veer away from the factual positions that it had taken in the first claim. Despite previous stipulations that only its tribal government could act to assert the legal rights of its members, Colville argued that the Wenatchi Constituent Tribe itself could legally claim its own off-reservation fishing rights. Reply Brief For the Appellants at 12-14, App. I *infra* 63a. Colville alleges that these are "new" fishing rights that were granted by the United States at the Icicle Creek under the 1894 Wenatshapam Agreement, and that the Wenatchis' claim is not the same one litigated

by Colville for intervention in this case. This claim directly contradicts the facts stipulated by the parties in the earlier case regarding the meaning of the Wenatshapam Agreement.

Nonetheless, the court below agreed with Colville and reversed. *U.S. v. Oregon,* 470 F.3d 809 (9th Cir. 2006); App. A *infra* 1a. In holding that *res judicata* did not bar the new Wenatchi claim, the court emphasized that Colville was prevented from bringing this claim in the intervention case by the conditions imposed by the District Court:

> Because Colville was required to meet the condition of establishing a treaty right before it would be allowed to intervene, it could not advance an argument that the Wenatchi Tribe obtained fishing rights from the 1894 Agreement independent of any treaty rights. In other words, if the Wenatchi acquired rights under the 1894 Agreement that were distinct from those reserved in the 1855 Treaty, Rule 24 itself would have prevented Colville from asserting those separate rights in a proceeding expressly limited to the adjudication of the 1855 rights.

Id. at 816; App. A *infra* 14a-15a. The court below also concluded that the Yakama Treaty of 1855 and the 1894 Agreement were entirely different "transactions" for purposes of determining whether the two claims are the same, despite the fact that the latter had its origin in the former. *Id.*; App. A *infra* 17a-18a. The court reasoned that its previous decision denying the Wenatchi Tribe any rights under that same treaty somehow gave credence to the new claim that its fishing rights were later cut from whole cloth:

> Accordingly, the law of the case supports the view that any fishing rights the Wenatchi gained under the 1894 Agreement must have been new rights. The 1855 Treaty and the 1894 Agreement, therefore, present entirely different transactional nuclei. Such a conclusion is in keeping with our requirement that, "when considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Central Delta Water Agency v. United States,* 306 F.3d 938, 953 (9th Cir. 2002).

Id.; App. A *infra* 15a. The court below remanded the case for trial on the merits. The injunction against the Wenatchi Tribe was then vacated by the District Court. The Yakama Nation's petition for rehearing and suggestion for rehearing *en banc* were denied. App. C *infra* 37a.

REASONS FOR GRANTING THE PETITION

I. THE RESTATEMENT (SECOND) OF JUDGMENTS § 24 EMPLOYS A PRAGMATIC TRANSACTIONAL TEST FOR DETERMINING WHETHER A CLAIM IS PRECLUDED BY *RES JUDICATA*

This Court has been very clear regarding the finality of judgments, and the policies behind the doctrine of *res judicata.* A final judgment on the merits "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States,* 463 U.S. 110, 130 (1983) (quoting *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948)). Enforcement of claim preclusion ensures that civil courts can fulfill their purpose of settling matters in dispute

between the parties that invoke their jurisdiction; conclusiveness "is essential to the maintenance of social order." *Id.* at 129 (quoting *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 49 (1897)).

Although the proper standards for determining whether a party's "cause of action" is the same for purposes of *res judicata* have vexed both federal and state courts for a long time, the past quarter century has seen a revolution in the way the federal circuit courts of appeals have examined the issue. This development is largely the legacy of a gradual adoption by the courts of Section 24 of the Restatement (Second) of Judgments, which provides as follows:

> 1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> 2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24(1) (1982). In most federal jurisdictions this approach has supplanted

the prior Restatement's test, in which claims were determined to be the same "if the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61 (1942). This Court has looked upon the new method favorably but has never applied it to any specific case. See *Nevada,* 463 U.S. at 130 n.12. The circuit courts, however, have employed the standard repeatedly since *Nevada*.

The element of the Restatement (Second) approach that makes it much broader in scope than past standards for claim preclusion is the factual focus on a transaction or series of transactions ("transactional nucleus"). The First Circuit, for example, has been fairly consistent in holding that it does not matter whether the legal theories are different in the second action; the test is whether the factual bases are the same, and it does not require "an exact match." See *U.S. v. Cunan,* 156 F.3d 110 (1st Cir. 1998) ("*res judicata* is intended to foreclose parties from multiple attempts to obtain relief for the same harm through the use of new legal theories"); *Manego v. Orleans Board of Trade,* 773 F.2d 1 (1st Cir. 1985) (alleged conspiracy in second civil rights claim with different alleged motives was based on same transactions as a prior claim and was precluded).

This broader test is perhaps best illustrated in the cases involving contracts. For example, the Tenth Circuit has looked at successive contracts as one "series of transactions" that should be treated as one unit for all claims to be brought in one action. See *Petromanagement Corporation v. Acme-Thomas Joint Venture,* 835 F.2d 1329, 1336 (10th Cir. 1988) (separate contracts for drilling and operation of oil and gas wells were a sufficiently related "series of transactions" to prohibit "piecemeal litigation"). The

Eleventh Circuit has also made it clear that claims based on a series of transactions occurring as a result of an initial contract must be brought in the same suit. *Trustmark Insurance Co. v. ESLU, Inc.*, 299 F.3d 1265 (11th Cir. 2002) (successive claims for breach of numerous insurance policies, issued under single contract from previous judgment, were barred). In the area of employment rights, the Tenth Circuit has also been very clear that separate decisions involving one employment constitute a "series" that bars additional claims. *King v. Union Oil Co. of California*, 117 F.3d 443, 445 (10th Cir. 1997) (termination and subsequent denial of benefits by employer were "not unrelated transactions").

The policy behind this standard is that parties should not be allowed to keep creating new legal claims for the same factual occurrences, even though such claims may appear to be distinctive. The Eighth Circuit summed it all up in a case that barred claims under federal law for transactions that had been already litigated under state law:

> One of the merits of the Restatement (Second)'s approach is that it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.

Lane v. Peterson, 899 F.2d 737, 744 (8th Cir. 1990). This policy clearly serves the purposes that this Court has

enunciated for enforcing *res judicata. Nevada,* 463 U.S. at 129.

Although not explicitly stated, most of the circuit court cases appear to use a modified form of the "but for" test commonly used in factual causation analysis to determine whether transactions are "connected" under the Restatement. See, e.g., *Petromanagement,* 835 F.2d at 1336. For example, if transaction B were the result of transaction A, or would not have occurred without it, the two would be sufficiently related to bar any successive claims based on either one.

II. THE OPINION BELOW THAT THE COLVILLE TRIBE'S PRESENT CLAIM IS NOT BARRED BY *RES JUDICATA* IS IN DIRECT CONFLICT WITH THE RESTATEMENT (SECOND) AND THE RULINGS OF OTHER CIRCUIT COURTS

The court below held that the Yakama Treaty of 1855 and the Wenatshapam Agreement of 1894 were "entirely different transactional nuclei," and as a result the Wenatchi Constituent Tribe was not barred by *res judicata* from bringing its claim that the Agreement granted off-reservation fishing rights to its members. *U.S. v. Oregon,* 470 F.3d 809, 816 (9th Cir. 2006); App. A *infra* 15a. This conclusion is not supported by the Restatement (Second)'s liberal analysis, and conflicts directly with the decisions of other circuit courts.

In its examination of the two transactions at issue in this case, the court below completely failed to use the proper factors for determining a "series" of transactions – whether they are related "in time, space, origin, or

motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) § 24(2); see also *Nevada,* 463 U.S. at 130 n.12. Instead, the court used a far more constrictive approach, stating that it should "narrowly construe the scope" of the earlier cause of action, citing its holding in *Central Delta Water Agency v. U.S.,* 306 F.3d 938, 953 (9th Cir. 2002). *U.S. v. Oregon,* 470 F.3d at 816; App. A at 15a. It is not clear why the court cites *Central Delta* – its facts are completely inapposite from those in this case because the later transaction (implementation of a water management plan) occurred *after* the prior judgments on the merits. The same is true of the decision to which the *Central Delta* court looked for its precedent. *Fund For Animals v. Lujan,* 962 F.2d 1391 (9th Cir. 1992).

This pinched construction could not be more in conflict with the preclusion standard upheld by other circuit courts of appeals, especially the Tenth Circuit. See *Petromanagement,* 835 F.2d at 1336; *King,* 117 F.3d at 445; see also Section I *supra.* As one court noted, the Restatement (Second) approach is "concerned with the substance, and not the form, of the proceedings." *Trustmark,* 299 F.3d at 1270. However, the court below made the clear error of looking at the form of Respondents' claim rather than its factual origin in the Treaty of 1855.

If the court below had conducted the proper Restatement (Second) analysis, it would have shown that the 1855 Treaty and the 1894 Agreement are inextricably linked. Article I of the Wenatshapam Agreement states clearly in its language that the fishery being sold to the United States is the one "set forth in Article 10 of said treaty aforesaid." 28 Stat. 320; App. F *infra* 51a. Thus neither

Colville nor Wenatchi can reasonably claim that the 1894 Agreement was an isolated incident apart from the Treaty itself. Nevertheless they are presently engaged in a quest to prove the same, arguing that any rights the Wenatchis retained under the Agreement are somehow not "treaty rights." However, Judge King's District Court opinion made the point very well:

> If it is Colville's position now that the meaning of the rights set forth in the Yakama Treaty was changed by the 1894 Agreement, then the transactional nucleus of facts surrounding the 1894 Agreement is absolutely the same nucleus of facts as was before Judge Marsh when he interpreting [sic] the Yakama Treaty. The relevant transactional nucleus of facts is Colville's claim of off-reservation fishing rights at Icicle Creek, whether it arose under the Yakama Treaty or the effect of the subsequent 1894 agreement on the provisions of the Treaty.

App. B *infra* 30a-31a. The District Court clearly recognized that under a pragmatic transactional analysis, it is difficult if not impossible to separate any fishing rights claims reserved under the Treaty from those currently being claimed by the Wenatchi Tribe. Under a "but for" test, they would also certainly be part of the same set of transactions as well.

The decision of the court below reversing this reasoning was a step backward to an analysis pre-dating the Restatement (Second), one that frequently allowed two separate actions from related facts if the legal issues presented were different. See, e.g., *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979). It does not uphold the policy considerations supporting use of the

"transactional nucleus" approach – that parties should not be able to come back with a "new theory" arising from the same facts. See *Lane,* 899 F.2d at 744. It also does not comport with the interest of the judicial system in fostering finality and the "peace and repose of society." *Nevada,* 463 U.S. at 129 (quoting *Southern Pacific,* 168 U.S. at 49).

III. BY JUDICIAL ESTOPPEL THE RESPONDENTS MAY NOT ASSERT FACTUAL POSITIONS IN THEIR PRESENT CLAIM THAT ARE INCONSISTENT WITH THE UNDISPUTED FACTS OF THEIR PREVIOUS CLAIM, AND RESPONDENTS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE PRESENT CLAIM

The Respondents will argue, as they did to the court below, that the Wenatchi Constituent Tribe must have had a "full and fair opportunity" to make this claim in the prior proceeding to be barred by *res judicata.* See *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481 n.22 (1982) (noting that this requirement normally applies to collateral estoppel but "*res judicata* or claim preclusion is subject to the same limitation"). Based on this consideration, the court below concluded that the intervention proceeding placed limitations on what the Colville Tribe could present at trial; the tribe had to prove that its fishing rights were under the treaty. *U.S. v. Oregon,* 470 F.3d at 815; App. A at 14a. As a result, the court held that the Wenatchi Tribe had been prevented by the District Court from making its present claim back in 1989.

This ruling was largely based on a complete reversal by the Colville and Wenatchi Tribes regarding two key facts that were not in dispute in the previous litigation.

Their new representations of previously litigated factual issues have essentially created a new claim where none existed in 1994. In formulating its opinion the court below ignored the record and allowed the Respondents to put a new suit on an old claim.

However, prior decisions of this Court have held that a party may not assume a position in a legal proceeding, and then assume a contrary position to the prejudice of the party that had acquiesced in the position taken previously. *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001); *Davis v. Wakelee,* 156 U.S. 680, 689 (1895). The purpose of this doctrine, known as judicial estoppel, is "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire,* 532 U.S. at 749 (quoting *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, 598 (6th Cir. 1982), and *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993)).

There are three basic factors that have been employed by the Court to determine whether judicial estoppel should apply in a given case. First, a party's later position should be clearly inconsistent with its earlier position. *Id.* at 750. Second, the party must have succeeded in persuading a court to accept that party's earlier position, so that another court's acceptance of an inconsistent position in a later proceeding would create the perception that either court was misled. *Id.* Finally, a third factor is whether the party asserting the inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751 (citing *Davis,* 156 U.S. at 689).

In this case it is clear that the Respondents' present positions regarding certain factual issues are inconsistent with the positions taken by the Colville Tribe in an earlier trial. First, the Respondents are now claiming that the Wenatchi Constituent Tribe and its members may take legal action to assert off-reservation fishing rights. Since these particular Respondents would be the only ones who could exercise such rights if established, they have correctly maintained that they would be necessary parties to such a claim. However, this position is diametrically opposed to that taken by the Colville Tribe during the intervention trial in 1991. At that time Colville argued from the outset that the Colville tribal government was the only entity that could represent and act for the legal interests of the Wenatchi Tribe and its other constituent tribes. This fact was stipulated by the Yakama Nation, was recognized by the decisions of both the District Court and the court below, and was indeed an important factor in their conclusion that the Colville Tribe does not have off-reservation treaty fishing rights. *U.S. v. Oregon,* 787 F.Supp. 1557, 1570 (D.Or. 1992) ("Because Colville is now their only recognized representative, the Colville Confederacy, as a whole, succeeds to the treaty interests reserved in 1855"); *U.S. v. Oregon,* 29 F.3d at 483 ("It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes").

Respondents also now take the position that the 1894 Wenatshapam Agreement granted off-reservation fishing rights to the Wenatchi Tribe. See 28 Stat. 320; App. F *infra* 52a-53a – Article II. This stance is in direct conflict with the agreed facts in the Colville intervention case, which briefly outlined the historical context and meaning of the 1894 Agreement. *U.S. v. Oregon,* 787 F.Supp. at 1580.

Colville accepted that under the Agreement, the United States purchased the Wenatshapam Fishery and then allotted lands to the Wenatchi Indians in the area of that fishery. *Id.* There is no mention of any grant of fishing rights by the federal government to the Wenatchis – only a grant of land allotments.[3] Petitioner agreed to those facts, and the District Court accepted them and incorporated them as factual findings as to the Wenatchi Indians. *Id.* at 1562.

As the opinion in the court below has shown, Colville's assertion of inconsistent positions in the present case has allowed the Respondents to gain an unfair second bite at the apple by avoiding *res judicata*. Although the District Court was not fooled, the Ninth Circuit panel that heard this case was clearly confused about the facts, because it accepted both that Wenatchi could make its own claim and that the 1894 Agreement could be the basis for that claim. Although Yakama pointed out repeatedly in its brief to the court below that the Respondents have changed the facts to suit their new claim, the resulting decision essentially adopted their positions. Now that the matter is back before the District Court, Colville has again switched positions, asserting that the Colville Tribe is the managing entity for a "Wenatchi" fishing season at Icicle Creek. Emergency Resolution of Colville Confederated Tribes for 2007 Fishing Season, App. H *infra* 56a-60a.

Although it was the sole intervenor in the previous action, Colville was permitted to slip the noose of *res*

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[3] Article II of the 1894 Agreement states that the "Wenatshapam Indians . . . shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law." 28 Stat. 320, 321; see also 25 U.S.C. § 334 (App. G).

judicata by arguing that the Wenatchi Tribe itself was never afforded an opportunity to litigate this claim. *Kremer v. Chemical Constr. Corp.*, 456 U.S. at 481 n.22. However, the agreed facts in the District Court clearly indicate just the opposite – any rights under the Agreement were indeed litigated, and the Colville Tribe expressly agreed that Wenatchi could not bring *any* claim for such rights on its own.

In giving the Wenatchi Tribe its own legal rights and thereby breathing new life into the 1894 Agreement, the Respondents' factual inconsistencies have unfairly prejudiced the legitimate interests of the Yakama Nation and its members. Respondents are therefore judicially estopped from taking those positions in this case, and their argument that there was no "full and fair opportunity" to litigate the present claim must fail.

CONCLUSION

The test that the court below used to determine whether the present claim of the Respondents is barred by *res judicata* is not in keeping with the broad approach of the Restatement (Second) of Judgments, in which a series of related transactions may constitute a single set of facts from which no party can split its claim. In determining that the Respondents may continue with a claim for alleged off-reservation fishing rights under an 1894 agreement with the United States, the court below is in direct conflict with decisions of other circuit courts that have construed the Restatement (Second), the Tenth Circuit in particular.

Although the District Court concluded in 1992 that none of the Respondents have retained rights to fish

off-reservation under the Yakama Treaty of 1855 (and the court below affirmed that decision), those same Respondents have returned for a second bite at the apple under a "new theory." However, it is clear that a broad construction of "transaction" under the Restatement (Second) produces a direct relationship between the Yakama Treaty and the 1894 Wenatshapam Agreement, thereby producing a unitary transactional nucleus. The approach of the court below, in which the scope of the prior claim is narrowly construed, is in direct conflict with this test.

Finally, the Respondents' argument that they did not have a full and fair opportunity to litigate the present claim is not supported in the record of this case. Colville made it very clear in its earlier action that it was the sole representative of the Wenatchi Constituent Tribe, and had sole authority to claim any rights under any theory. As a result, both those parties are precluded from presenting any new fishing rights claims. In addition, the meaning and historical context of the 1894 Agreement in relation to fishing rights was stipulated by the parties in the prior case. *Res judicata* should therefore bar any new claim by the Respondents based on such Agreement.

Based upon the foregoing, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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May 29, 2007

APPENDIX A

470 F.3d 809

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,
Plaintiff,

v.

State of Oregon, State of Washington,
Defendants.

Confederated Tribes and Bands of the Yakama Indian Nation,
Appellee,

v.

Confederated Tribes of the Colville Indian Reservation; Joseph Pakootas, Chairman of the Colville Business Council; Wenatchi Constituent Tribe; John St. Pierre, Spokesman for the Wenatchi Constituent Tribe,
Appellants.

No. 03-35773

D.C. No.
CV-68-00513-MFM
OPINION

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued & Submission Deferred March 11, 2005
Resubmitted November 24, 2006
Portland, Oregon

Filed December 4, 2006

Before: Proctor Hug, Jr., Marsha S. Berson, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Hug

COUNSEL

Harry R. Sachse, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, Washington, D.C., for the appellants.

Fronda Woods, Assistant Attorney General, WSBA # 18728, Olympia, Washington, for the intervenor-appellee.

Tim Weaver, Weaver Law Office, Yakima, Washington, for the intervenor-appellee.

Howard G. Arnett, Karnopp Petersen LLP, Bend, Oregon, for intervenor-appellee.

OPINION

HUG, Circuit Judge:

In this case we determine whether the Confederated Tribes of the Colville Indian Reservation (Colville) is foreclosed by res judicata from asserting the claim of its Wenatchi Constituent Tribe (Wenatchi) to fishing rights at the Wenatshapam Fishery on Icicle Creek, a tributary to the Columbia River. The Yakama[1] Nation sought and obtained an injunction preventing the members of the

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[1] The name was changed from "Yakima" to "Yakama" in 1994 to reflect the native pronunciation. "Yakama" is used in this opinion, except where historical accuracy requires that "Yakima" be used.

Wenatchi Tribe from fishing at that location.[2] In granting the injunction, the district court found that Colville's earlier failed effort to intervene in litigation over off-reservation fishing rights in the area served to bar Colville from asserting the alleged rights as a defense to the injunction. *See United States v. Oregon,* 787 F. Supp. 1557, 1572 (D. Or. 1992). We hold that the requisite identity of claims between the earlier intervention attempt and the present injunction hearing does not exist and, consequently, res judicata does not apply. We therefore reverse and remand to the district court for a hearing on the merits.

I. Background

In 1855, the United States entered into two treaties with a group of Indian tribes, the Yakama Treaty of June 9, 1855, and the Nez Perce Treaty of June 11, 1855. In this action between the Yakama Nation and the Confederated Tribes of the Colville Indian Reservation (on behalf of the Wenatchi Tribe), only the Yakama Treaty is involved.

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[2] Although Colville's attempt to intervene in *United States v. Oregon* was denied and Colville is, therefore, not a party to that case, jurisdiction is proper because a court may enjoin non-parties whose actions threaten to interfere with prior orders of the court. *S.E.C. v. Wencke,* 622 F.2d 1363, 1370 n.11 (9th Cir. 1980); *see also* Fed. R. Civ. P. 71.

This court reviews for abuse of discretion a district court's decision to issue permanent injunctive relief, *Fortyune v. American Multi-Cinema, Inc.,* 364 F.3d 1075, 1079 (9th Cir. 2004), but reviews de novo the underlying legal conclusions on which the district court based its decision. *Biodiversity Legal Foundation v. Badgley,* 309 F.3d 1166, 1176 (9th Cir. 2002). "The applicability of the doctrine of res judicata is a question of law subject to de novo review." *In re Schimmels,* 127 F.3d 875, 880 (9th Cir. 1997).

The Wenatchi Tribe was one of the fourteen tribes represented at the negotiation of the Yakama Treaty. The treaty specified that tribes "for the purposes of this treaty, are to be considered as one nation, under the name of 'Yakama.'" Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1885). Under the treaty, the tribes gave up most of their lands in return for a specific reservation with set boundaries and also certain other benefits such as schools, a hospital, various services and a payment of $200,000 payable over twenty years. This reservation for the Yakama Nation was to be set apart, surveyed and marked out for the exclusive use of the fourteen confederated tribes of the Yakama Nation. These tribes were to settle on this reservation within one year. The treaty provided "nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." *Id.* at art. II, 12 Stat. at 952. The land was later surveyed and set apart as provided in the treaty.

The 1855 Treaty also provided:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Id. at art. III, 12 Stat. at 953.

The treaty also set aside an additional reservation for the use of the confederated tribes of the Yakama Nation. Article X of the Treaty provided:

> That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Id. at art. X, 12 Stat. at 954.

Despite the promise made in Article X, no attempt was made by the United States to survey the six-square-mile reservation for almost forty years. The Wenatchi remained at this Wenatshapam Fishery Reservation and fished there during this time, firmly believing that a survey would be made and they would be secure in this reservation.

Along with four other signatory tribes, the Entiat, Chelan, Columbia, and Paloose Tribes, the Wenatchi did not move onto the surveyed Yakama Nation Reservation. The Wenatchi remained and fished on their aboriginal lands at the Wenatshapam Fishery until they were moved by the federal government in 1902 and 1903 to the Colville Reservation. Events transpiring during this period are set forth in some detail in *United States v. Oregon,* 787

F. Supp. 1557 (D. Or. 1992), and in our opinion on appeal of that case, at 29 F.3d 481 (9th Cir. 1994).[3]

The United States finally authorized a survey to be conducted of the Wenatshapam Fishery Reservation in 1983. The surveyor, Deputy United States Surveyor Oliver B. Iverson, had established monuments and marks on trees to set out this six-square-mile area. However, before the survey was completed, the newly appointed Yakima Indian Agent, Lewis T. Erwin, ordered Iverson to stop the surveying and destroy all the monuments and trees that had markings. Instead, he directed the surveyor to survey an area some distance away in the mountains next to a lake, but not near the river. When former Yakima Indian Agent Jay Lynch learned that the survey had placed the reservation in the mountains at Lake Wenatchee, he wrote to complain about the whole affair: "I do not think I can give you a clearer idea of the situation than to quote the remarks of an old Indian . . . 'Does our Great Father at Washington think a salmon is an eagle that lives on top of a mountain, or does he think a salmon is a deer that lives in the woods and hills . . . ?'" Hart History at 189.

In the meantime, quite a number of white settlers had settled on the proposed Wenatshapam Fishery Reservation and a railroad had been built through the area. Apparently as a result of these developments, the United States commenced negotiations with the tribes of the Yakama Nation to purchase the area that had been described in Article X of the 1855 Treaty. (The Government had not

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[3] Extensive details are also provided in E. Richard Hart, *The History of the Wenatchi Fishing Reservation*, 13 W. LEG. HIST. 163 (2000) [hereinafter Hart History], a part of the record in this case.

accepted Agent Erwin's survey of the mountainous area because it was incorrect.) An agreement was executed on January 8, 1894. It is important to note that this was not an amendment to the 1855 Treaty. The agreement provided for the sale for $20,000 of the six-square-mile fishery area that had been described in Article X of the 1855 Treaty. Article I of the 1894 Agreement provided:

> The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of in, and to all their right of fishery, as set forth in article 10 of said treaty aforesaid, and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.

Agreement with the Yakima Nation of Indians (1894 Agreement), art. I, 28 Stat. 320 (1894).

The Wenatchi contend that the Yakama Nation was unwilling to sell the property without a provision guaranteeing the land and fishing rights for the Wenatchi Tribe that had continued to live on its aboriginal territory and fishery. In support of this argument, Colville cites to negotiations at the time of entering into the agreement. Indian Agent Erwin stated to Chief John Harmelt, the leader of the Wenatchi Tribe:

> There is one thing I want to impress on these Indians from the Wenatchee, and that is that they are not to be robbed of an acre of land, but, on the contrary, the Government proposes to give them land where they now are. The selling of this fishery does not interfere with their rights at all. The proposition is to buy this little piece of

> land and to allot to the Indians where they now live.

S. Exec. Doc. No. 67, at 30 (1894).

As a result of these negotiations, the 1894 Agreement contained the following key provision, in Article II:

> After the ratification of this agreement by Congress and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law.[4]

1894 Agreement, art. II, 28 Stat. at 321. The agreement to provide allotments to the 180 members of the Wenatchi Tribe that were still living at the fishery would have amounted to approximately 24,000 acres. However, the government again failed to fulfill its promise, as it never made the allotments available to the Wenatchi. Hart History at 195-200, 202.

The Wenatshapam Fishery is now occupied primarily by the Leavenworth National Fish Hatchery. The management of the hatchery has welcomed fishing by members of both the Wenatchi and Yakama Tribes. The fish taken are those designated by the hatchery as surplus to its needs. Until the current dispute, the members of the Wenatchi and Yakama Tribes have fished there peacefully. The hatchery has permitted the Wenatchi Tribe to hold its tribal ceremonies on the grounds.

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[4] The Wenatshapam Indians referred to in the 1894 Agreement are the same as the Wenatchi Indians.

The Yakama Nation has now brought this action for an injunction to exclude the Wenatchi from fishing at the Wenatshapam Fishery, their aboriginal fishery. Colville, on behalf of its constituent tribe, the Wenatchi, defends on the ground of rights granted to the Wenatchi by the 1894 Agreement with the United States that was ratified by Congress. Under the district court's res judicata ruling, however, the Wenatchi Tribe did not obtain a ruling on the merits of their claim. Through unfulfilled promises and procedural rulings, they would, under that ruling, lose both the land they were guaranteed adjacent to the fishery and their fishing rights.

II. Procedural Background

In 1968, the United States Supreme Court ruled on the extent state regulation could impinge on tribal treaty rights. *Puyallup Tribe v. Dept. of Game,* 391 U.S. 392, 398-403 (1968). In light of that case, two suits, later consolidated, were filed in 1968 in the U.S. District Court for the District of Oregon to determine the extent of the permissible regulation of Indian treaty fishing rights by the State of Oregon. The progress of that case is summarized in *United States v. Oregon,* 699 F. Supp. 1456 (D. Or. 1988):

> The pending case is the outgrowth of the consolidation of two cases filed in 1968. The first case was designated *Sohappy v. Smith,* [302 F. Supp. 899], while the second was designated by the heading in this case. Each suit was brought against the State of Oregon to define the Indians' *treaty right* to take fish "at all usual and accustomed places" on the Columbia River and its tributaries.
>
> . . .

> An initial opinion was entered on July 8, 1969 wherein the Honorable Robert C. Belloni *construed the Indians' treaty fishing right* and considered the manner and extent to which the State of Oregon could regulate initial fishing. *Sohappy,* 302 F. Supp. at 911-12. He retained jurisdiction to grant further or amended relief. *Id.*

Id. at 1458-59 (emphasis added). The State of Washington was allowed to intervene, and Judge Belloni urged the parties to adopt a comprehensive plan for allocation and management of the Columbia River anadromous fish. A five-year plan was initially adopted, followed by several one-year plans. In 1988, a ten-year plan was adopted.

In 1994, Colville sought to intervene in the *United States v. Oregon* litigation on behalf of five constituent tribes – the Wenatchi, Entiat, Chelan, Columbia, and Palous tribes – that were parties to the Yakama Treaty of June 9, 1855, and on behalf of the Chief Joseph Band of Nez Perce, which was a party to the Nez Perce Treaty of June 11, 1855. Both treaties had reserved off-reservation fishing rights on the Columbia River and its tributaries. Colville was allowed to intervene temporarily on the condition that those constituent tribes could prove that they had 1855 Treaty rights. Judge Marsh stated in his opinion that:

> Colville seeks intervention in a proceeding that has been under the continuing jurisdiction and supervision of this court since 1968. On August 7, 1989, I granted Colville's motion to intervene, on the condition that it first establish that it has federally secured off-reservation *treaty fishing rights* either by initial grant or by succession in interest.

United States v. Oregon, 787 F. Supp. at 1560-61 (emphasis added). After a three-day bench trial on this issue, Judge Marsh concluded:

> I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and the present day holder of *treaty rights* reserved to the Wenatchi, Entiat, Chelan, Columbia, Palus [Tribes] or Chief Joseph Band of Nez Perce in the treaties of 1855 with the Yakima Nation or with the Nez Perce. Accordingly, the Colville complaint in intervention is dismissed.

Id. at 1572 (emphasis added).

Colville appealed the denial of intervention to our court. Although there was some confusion as to whether Colville was asserting a claim as to all of its constituent tribes, this was cleared up at oral argument in that appeal when Colville clarified that it was asserting only the rights of the six constituent treaty tribes. On appeal, we first stated, "[i]t is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes, and we agree with Colville that if the constituent tribes retained treaty fishing rights, Colville may properly assert these rights." *United States v. Oregon,* 29 F.3d 481, 483 (9th Cir. 1994), *amended by* 43 F.3d 1284 (9th Cir. 1994).

We went on, however, to affirm Judge Marsh's decision that neither Colville nor the Wenatchi had off-reservation fishing rights flowing from the 1855 Treaty. *Id.* at 486-87. In doing so, we also noted that the parties agreed that the Wenatchi, Entiat, Chelan, Columbia and Palous Tribes were all signatories to the 1855 Treaty, but that "[t]he Yakima Treaty of 1855 envisioned the creation

of a successor tribe, a 'Yakima Nation' composed of all of the people represented by the signatories to the Treaty." *Id.* at 485. The five tribes never moved to the reservation created for the Yakama Nation, which was the entity in which the treaty rights vested. *Id.*

We further observed that the present Yakama Nation was recomposed in 1974 and has exercised treaty rights as a successor to the entities that signed the original 1855 Treaty. We concluded that, "by deliberately separating from the Yakima Nation, these tribes failed to maintain political cohesion with the tribal entity in which the *treaty fishing rights* are vested." *Id.* at 486 (emphasis added).

In the present action, the district court determined that the intervention proceeding had a res judicata effect because Colville had the opportunity to raise the claim it is raising now, premised on the 1894 Agreement, in the earlier proceeding, but chose not to.[5] Colville appeals the res judicata ruling, arguing that it was precluded from raising the claim by the district judge's required conditions for intervention, and that the intervention proceeding did not bar consideration of the merits of its claim under the 1894 Agreement.

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[5] Because it found claim preclusion applied, the district court did not address whether issue preclusion also applied. "The doctrine of issue preclusion prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (quoting *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)). As our discussion below indicates, the question of whether the 1894 Agreement granted the Wenatchi new rights to fish at the Wenatshapam Fishery was never litigated or decided in the intervention proceeding. Colville is therefore not collaterally estopped from raising the issue in the current action.

III. Discussion

A. Intervention

[1] In order to intervene in the action concerning the treaty rights of the five tribes that had been parties to the 1855 Yakama Treaty, Judge Marsh made it clear that Colville had to establish, as a condition to intervention, *treaty rights* under the 1855 treaties. Colville did not become a party to the litigation, in which it could litigate any other issues concerning fishing rights of any of its constituent tribes, until it satisfied that condition for intervention. Judge Marsh held that Colville failed to do so and denied intervention. The condition that Judge Marsh imposed follows logically from the constraints of Federal Rule of Civil Procedure 24(a)(2), which provides for intervention when "the applicant claims an interest relating to the property or transaction which is the subject of the action." The subject of the action from 1968 on was, as Judge Marsh stated, "to define the Indians' treaty rights to take fish 'at all usual and accustomed places.'" 787 F. Supp. at 1559. A claim to fishing rights resulting from the 1894 Agreement was not a claim of "an interest relating to the property or transaction which is the subject of the action" as specified in Rule 24(a)(2). The subject of the action was the *treaty fishing rights* of the tribes, not fishing rights in general. Colville did seek intervention on the basis that the history of the matter did somehow involve treaty rights of the five Indian tribes. Judge Marsh properly ruled that it did not and denied intervention. Colville did not meet the condition Judge Marsh had set forth to permit intervention and did not meet the requirements of Rule 24(a)(2), as it was not the subject of the action.

[2] The scope of Colville's complaint in intervention cannot, therefore, fairly be characterized as solely a function of self-imposed trial strategy.[6] The limitations on the intervention proceeding clearly precluded Colville from asserting the right now claimed by the Wenatchi. The Wenatchi contend that all rights reserved under Article X of the 1855 Treaty were ceded to the United States by the Yakama Nation in 1894, but only after Yakama Nation representatives were satisfied that the Wenatchi would still be able to remain on their land and fish at Wenatshapam. The Wenatchi thus characterize their fishing rights under the 1894 Agreement as *new* rights, granted by the United States as part of its independent agreement to buy back the reservation that should have been, but never was, set aside in Article X of the 1855 Treaty. In other words, according to Colville, the 1894 Agreement both terminated existing treaty rights of the Yakama Nation under Article X and granted entirely new rights (i.e., allotments and fishing privileges) to the Wenatchi.

[3] Consequently, the argument based on the 1894 Agreement could not have been part of Colville's claim based on the 1855 Treaty. Because Colville was required to meet the condition of establishing a treaty right before it would be allowed to intervene, it could not advance an

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[6] Similarly, Colville's proposed findings of fact regarding the 1894 Agreement, submitted in support of its motion to intervene and ultimately rejected by Judge Marsh, do not support a conclusion contrary to that reached here. The proposed facts are ambiguous, but could be read to assert that the 1894 Agreement itself created new rights for the Wenatchi to the land and fishery identified in Article X (but never properly surveyed and reserved before being ceded and extinguished in 1894). Such an argument would have been improper and impermissible because it did not assert an interest in the 1855 Treaty itself and, therefore, fails under the same logic outlined in the text.

argument that the Wenatchi Tribe obtained fishing rights from the 1894 Agreement independent of any treaty rights. In other words, if the Wenatchi acquired rights under the 1894 Agreement that were distinct from those reserved in the 1855 Treaty, Rule 24 itself would have prevented Colville from asserting those separate rights in a proceeding expressly limited to the adjudication of the 1855 Treaty rights.

[4] One additional factor counsels against applying res judicata here. In affirming Judge Marsh's denial of Colville's motion to intervene, we found that well before 1894 the Wenatchi had refused to move to the Yakama Nation Reservation and had separated themselves politically from the Yakama Nation, thereby depriving themselves of any 1855 Treaty rights. *See United States v. Oregon,* 29 F.3d at 485-86 (concluding that, based on the evidence, the Wenatchi "deliberately sought to separate themselves" from the Yakima Nation and, therefore, held no rights under the 1855 Treaty).

[5] Accordingly, the law of the case supports the view that any fishing rights the Wenatchi gained under the 1894 Agreement must have been new rights. The 1855 Treaty and the 1894 Agreement, therefore, present entirely different transactional nuclei. Such a conclusion is in keeping with our requirement that, "when considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Central Delta Water Agency v. United States,* 306 F.3d 938, 953 (9th Cir. 2002).

The 1894 Agreement was not set forth as an amendment to the 1855 Treaty. Rather, it was an agreement for the sale of the Wenatshapam Fishery that had been given

to the tribes of the Yakama Nation by the 1855 Treaty, with specific benefits being reserved for the Wenatchi Tribe, which had continued to reside and fish there.

The Wenatchi Tribe maintains that, under the 1894 Agreement, the Yakama Nation gave up all of its fishing rights in the Wenatshapam Fishery under the provision that states:

> The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of in, and to all their right of fishery, as set forth in article 10 of said treaty aforesaid, and also all their right, title, interest, claim or demand of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.

1894 Agreement, art. I, 28 Stat. at 320. If the Yakama Nation did give up all its fishing rights at the Wenatshapam Fishery, then it would have no basis for showing the harm necessary for injunctive relief.

The Yakama Nation contends that the provision that gave the special rights to the Wenatshapam Indians did not include fishing rights. The provision states:

> After the ratification of this agreement by Congress and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law.

Id., art. II, 28 Stat. at 321.

Both provisions appear to be ambiguous in light of the context in which the agreement took place, the statements of the parties concerning the meaning of the terms of the agreement, and the recognition that this was an agreement drafted by the Government to reflect the understanding of the Indians, who had a lesser familiarity with the legal technicalities involved.

This, of course, is a matter to be determined on the merits and is not before us on the res judicata determination.

B. Res Judicata

[6] Res judicata involves both claim preclusion and issue preclusion. An issue can be precluded in subsequent litigation only if the same issue was actually litigated. *Steen v. John Hancock Mut. Life Ins. Co.,* 106 F.3d 904, 912 (9th Cir. 1997). Issue preclusion is not appropriate here because rights established by the 1894 Agreement independent of any treaty rights were not litigated. In fact, they could not be argued without first meeting the condition of intervention imposed by both Judge Marsh and Rule 24. Consequently, Judge Marsh made no ruling on that subject.

[7] The res judicata ruling by the district court in this action was not based on issue preclusion; rather, it was based on claim preclusion. Under claim preclusion, a subsequent action is precluded if the same *claim* was previously litigated. *Nordhorn v. Ladish Co.,* 9 F.3d 1402, 1404 (9th Cir. 1993). As such, claim preclusion requires an identity of claims. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 322 F.3d 1064, 1077 (9th Cir. 2003). A claim is also precluded if that claim

could have been asserted in the prior litigation. *Id.* at 1078. In this case, the claim litigated in the intervention proceeding was whether the five tribes had 1855 Treaty rights. The rights of the Wenatchi Tribe under the 1894 Agreement were not litigated, nor could they have been brought in that proceeding because, as we have discussed, the condition for intervention was not met.

The Yakama Nation relies on the *Tahoe-Sierra* case in contending that Colville is precluded by res judicata from asserting the rights of its constituent tribe, the Wenatchi. That case is easily distinguished. It involved two parties that had been litigating several lawsuits concerning the requirements of the 1987 plan adopted by the Tahoe Regional Planning Commission that was designed to preserve the beauty of Lake Tahoe by limiting development in designated areas. The Tahoe-Sierra Preservation Council, a property owners' association, filed a new action alleging wrongs it had unsuccessfully litigated before. *Id.* at 1076. We held that the association had a full opportunity to contest the provision of the 1987 plan in the prior litigation, and that those claims were, therefore, foreclosed by res judicata. *Id.* at 1086. *Tahoe-Sierra* is very different from the case before us, where Colville was precluded from advancing the claims of the Wenatchi Tribe under the 1894 Agreement by the requirements for intervention imposed by Rule 24 and the district court's order.

[8] We conclude that Colville is not precluded by res judicata from asserting the claim of the Wenatchi Tribe to fishing rights at the Wenatshapam Fishery based on the

1894 Agreement; thus, we reverse the district court and remand the case for trial on the merits.[7]

REVERSED AND REMANDED.

[7] Judge King mentioned in his district court opinion that, "[a]s I noted during oral argument, I had hoped that the parties could reach an agreement on this issue. There is a history of broken promises with respect to many of the tribal entities and I am aware that at least at some level, neither side wishes to be in the position we are in today." The resolution of the res judicata issue by this court presents another opportunity for settlement on the merits of this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, vs. STATE OF OREGON, *et al.*, Defendants.	)	Civil No. 68-513-KI OPINION

KING, Judge:

This case has been under the continuing jurisdiction and supervision of this court since 1968, when the United States initiated suit on behalf of certain Indian tribes in Oregon to define these tribes' treaty rights to take fish at all usual and accustomed places along the Columbia River and its tributaries. Several tribal and governmental entities have intervened in this action, and the longstanding litigation regarding Columbia River fish management has resulted in a number of decisions respecting Indian fishing rights and state regulatory authority.

At issue before the court now is the Confederated Tribes and Bands of the Yakama Nation's ("Yakama") request to enjoin the Confederated Tribes of the Colville Reservation ("Colville") from fishing at Icicle Creek, near Leavenworth, Washington. On May 29, 2003, I granted Yakama's motion for temporary restraining order because I found that Yakama was likely to prevail on the merits and made a sufficient showing of irreparable harm to Yakama's treaty fishing rights. Based on the stipulation of

the parties, I ordered that the Temporary Restraining Order stay in effect pending full briefing, a hearing and the resolution of the Yakama's motion for preliminary injunction.

After the temporary restraining order was in place, I also instructed the parties to submit additional briefing on two issues: (1) Colville's new theory that it is entitled to fish at Icicle Creek based not on treaty rights, but instead on Yakama's cessation of rights under the 1894 agreement, and (2) the effect of the doctrines of issue and claim preclusion on Colville's ability to assert this new theory during this proceeding. After a thorough review of the materials submitted by Colville and Yakama and the prior decisions of this court, I find that Colville is precluded from raising its new theory in these proceedings, and I grant Yakama's motion for injunctive relief (#2326).

FACTUAL AND PROCEDURAL BACKGROUND

The more than thirty-five years of litigation over Columbia River fishing rights has resulted in a number of very detailed opinions setting forth the background of this case and the history surrounding the formation of the United States' treaties with the Indians in the Pacific Northwest. *See United States v. Oregon,* 122 F.R.D. 571 (D. Or. 1988); *United States v. Oregon,* 787 F. Supp. 1557 (D. Or. 1992); *United States v. Oregon,* 29 F.3d 481 (9th Cir. 1994); *See also United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974). I will not repeat that history here. I will attempt to summarize the factual and procedural issues that are relevant to the determination of the issue now before the court.

I. The 1855 Treaties and the 1894 Agreement

In 1855, the United States entered into two treaties, one with Yakama and one with the Nez Perce Tribe, which have been at issue throughout this litigation. The Ninth Circuit described these treaties as "among the treaties that were signed and negotiated by Governor Stevens in the 1850s in a hasty effort to clear land occupied by Indians for development by settlers." *Oregon,* 29 F.3d at 484. Of relevance to the motion before the court is the 1855 Yakama Treaty.

Articles I, II, and III of the 1855 Yakama Treaty set out what lands Yakama ceded to the United States. These provisions also reserved certain other lands for Yakama, as well as its rights to fish at "all ususal [sic] and accustomed places." Article X of the Treaty also established a separate reservation:

> That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

It appears that the United States never properly lived up to its commitment to survey the Article X reservation and remove it from the public domain. The reservation that was eventually established was in the mountains, a distance from the location of the "Wenatshapam Fishery."

In 1894, the United States then negotiated another agreement with "the several tribes and bands composing the Yakima[1] Nation," which provided for the relinquishment of the Article X reservation area. Specifically, the 1894 agreement provided that Yakama "hereby cede and relinquish to the United States all their right . . . of fishery as set forth in Article X of the Treaty aforesaid. . . ." The agreement was silent as to Yakama's Article III off-reservation fishing rights, which have been confirmed in earlier proceedings in this case.

As explained further below, it is Colville's position in these proceedings that the United States' failure to properly survey and reserve the land referenced in Article X led to the 1894 agreement. Colville contends that the 1894 agreement was made to secure for the Wenatchi, which is now a Colville constituent group, allotted land at the site of their original reservation and to guarantee their rights to fish there, via Yakama's cessation of its rights to both the Wenatshapam land and fishery. Yakama strongly disagrees with Colville's interpretation of the 1894 agreement and its effect on Yakama's treaty rights.

II. Prior Rulings Regarding Colville

Yakama is a party to this case but Colville is not. Colville has on two occasions sought to intervene in this action. Through that process, Colville has also specifically brought the issue of fishing at Icicle Creek before the court.

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[1] The spelling used in the treaty and 1894 agreement is "Yakima." The current spelling is "Yakama."

A. Colville's 1989 Intervention Motion

In 1989, Colville sought to intervene in *USA v. Oregon* to establish Treaty Tribe status and to participate in the action and the then-existing Columbia River Fish Management Plan ("CRFMP") as a Treaty Tribe. In its petition to intervene, Colville asserted that six of its constituent tribes retained fishing rights as a result of the 1855 treaties. As explained above, under both of these treaties, tribes ceded lands to the United States, but reserved off-reservation fishing rights on the Columbia.

At this point, the case was before the Honorable Malcom F. Marsh. Judge Marsh allowed Colville's motion to intervene for the limited purpose of determining whether Colville could establish Treaty Tribe status under the 1855 treaties. Judge Marsh held a court trial in 1991 on the motion and found that:

> [T]he Wenatchi, Entiat, Chelan and Columbia Indians who moved to the Colville Reservation followed Moses and refused to be bound by the 1855 treaty. Moses and his followers deliberately sought to separate themselves from the "Yakima Nation" identified in the treaty. Thus, although many current members of the Colville Confederacy are descendants of groups identified as belonging to part of the Yakima Nation within the 1855 treaty, Colville has failed to establish that those descendants are entitled to exercise rights reserved to the Wenatchi, Entiat, Chelan and Columbia who signed the treaty as part of the "Yakima Nation."

Oregon, 787 F. Supp. at 1571. Judge Marsh concluded that Colville was not a Treaty Tribe, and he dismissed its complaint in intervention:

> I find that those treaties, and the judicial decisions which have struggled with their interpretations, have sought to achieve a system which recognizes an organized tribal structure as the administrator of rights reserved under the treaties in the form and substance which most closely resembles the framework envisioned by the treaties. I find the the [sic] administrators of those rights, as reflected in the 1855 treaties, are The Confederated Tribes and Bands of the Yakima Indian Nation and The Nez Perce Tribe of Idaho. Based on the foregoing, I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and the present day holder of treaty rights reserved to the Wenatchi, Entiat, Chelan, Columbia, Palus, or Chief Joseph Band of Nez Perce in the treaties of 1855 with the Yakima Nation or with the Nez Perce. Accordingly, the Colville complaint in intervention is dismissed.

Id. at 1572.

Judge Marsh's ruling was affirmed by the Ninth Circuit, which made clear that neither the Colville Tribe nor any of its constituent bands such as the Wenatchi Band had off-reservation rights flowing from the treaties. *Oregon,* 29 F.3d at 486.

With respect to Icicle Creek specifically, before the 1991 court trial on Colville's rights, Colville had twice asked Judge Marsh to allow it to open off-reservation fisheries at Icicle Creek. Judge Marsh denied those motions on the basis that Colville had not established off-reservation fishing rights with respect to fish covered by the CRFMP, noting that the Icicle Creek issue necessarily

related to the then-yet-to-be-decided issue of Colville's treaty rights.

B. Colville's 1999 Motion to Intervene

In 1999, Colville again sought to intervene in the action. This time, Colville stated it sought to intervene solely to protect its *on*-reservation fishing rights. The Columbia River Treaty Tribes opposed the motion. Judge Marsh denied the motion to intervene as untimely because it was filed thirty-one years after the litigation commenced and ten years after its original motion to intervene. Judge Marsh also found that Colville's interests in upstream resources were too remote to be within the proper subject matter of the case.

C. Present Dispute Over Icicle Creek

The dispute between Yakama and Colville over Icicle Creek has come up again for the second time in the three years since this case has come in front of me. In these instances, as the other tribal parties describe it, instead of moving to intervene in the action, Colville has "just gone fishing." In June 2002, Yakama filed a motion for temporary restraining order and preliminary injunction to enjoin Colville and its members from fishing at Icicle Creek. I set the parties on a briefing and hearing schedule but asked them to try to settle the dispute. In July 2002, Yakama withdrew its motion. Now, approximately one year later, Yakama again moves to enjoin Colville from fishing at Icicle Creek. This time, apparently unable to resolve the dispute between them, both sides agree that this court should resolve the issue.

Yakama files the pending motion as a "motion for preliminary injunction." At one point in its briefing Yakama also asks the court to *permanently* enjoin Colville from fishing at Icicle Creek, and during oral argument counsel for Yakama represented that for all intents and purposes, Yakama was seeking permanent relief. Colville is not a party to the case and no trial is set on these issues. Therefore, I agree with Yakama that a "preliminary injunction" is not the proper label, as I do not see what the injunction would be "preliminary" to. Accordingly, I will construe Yakama's motion as a motion for permanent injunctive relief.

LEGAL STANDARDS

Injunctive relief is proper only if monetary damages or other legal remedies do not compensate the plaintiffs for their injuries. *Walters v. Reno,* 145 F.3d 1032, 1048 (9th Cir. 1998). Plaintiffs must establish actual success on the merits and that the balance of equities favors injunctive relief. *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549, 558 (9th Cir. 1990). They must prove by a preponderance of the evidence the conditions and circumstances on which they base the right to and necessity for injunctive relief. The court has broad discretion in fashioning the appropriate remedy but an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled. *Id.*

DISCUSSION

I. Jurisdiction

As a preliminary matter, I want to address the court's jurisdiction to hear this motion. In anticipation of an expected argument by Colville, a non-party, that this court

lacks jurisdiction to issue an injunction against it, Yakama makes a number of arguments. Yakama argues that when Judge Marsh allowed Colville limited intervention status, he did so on the condition that the Colville accept the law of this case, including that intervenors are subject to future court orders. Yakama acknowledges that Colville was not a successful intervenor, but notes that Colville subjected itself to the court's jurisdiction and agreed to be bound by the law of the case. Additionally, Yakama cites several cases that suggest I have jurisdiction over non-parties to enforce prior court orders. *See, e.g., United States v. Crookshanks,* 441 F. Supp. 268, 270 (D. Or. 1977) (holding that a court can enjoin non-parties whose actions threaten to interfere with compliance with prior orders of the court).

At oral argument, Colville stated on the record that it did not contest this court's jurisdiction and indeed wanted the court to resolve the pending issue. Although neither side contends that this court lacks jurisdiction at this point, I note that I have jurisdiction for the reasons argued by Yakama.

II. Yakama's Motion

Yakama's motion seeks to enjoin Colville's fishing at Icicle Creek based on this court's prior rulings that Colville has failed to establish treaty rights to conduct such a fishery. In response, Colville argues that the right of the Colville Wenatchi to fish at the disputed location does not depend on the treaty rights that have been adjudicated in this case, but rather on a new theory regarding the 1894 agreement between the United States and Yakama. Colville argues that in this agreement, the Wenatshapam

fishery, where the Leavenworth Hatchery is now located, was separated from the Yakama Nation and any rights Yakama had to the land or fishery under the 1855 Treaty were terminated. Although Yakama strongly disagrees with Colville's interpretation of the 1894 agreement, Yakama primarily argues that under the doctrines of issue and claim preclusion, Colville is precluded from raising this argument.

Res judicata, the preclusive effect of a previous adjudication, includes two doctrines, claim preclusion and issue preclusion. *Robi v. Five Platters, Inc.,* 838 F.2d 318, 321 (9th Cir. 1988). Claim preclusion bars a later suit if the first suit (1) involved the same parties or their privies; (2) reached a final judgment on the merits; and (3) involved the same claim as the later suit. *Nordhorn v. Ladish Co., Inc.,* 9 F.3d 1402, 1404 (9th Cir. 1993). The doctrine of issue preclusion, also known as collateral estoppel, prevents relitigation of issues actually litigated and necessarily decided in a prior proceeding, after a full and fair opportunity for litigation. *Shaw v. Hahn,* 56 F.3d 1128, 1131 (9th Cir.), *cert. denied,* 116 S. Ct. 418 (1995). Yakama presents strong arguments as to why either doctrine would prevent Colville from making the arguments it advances here, but I will focus on claim preclusion.

Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Robi,* 838 F.2d at 321 (citation omitted). The Ninth Circuit considers the following factors when determining whether two claims are the same for res judicata purposes:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Nordhorn, 9 F.3d at 1405.

Colville's primary argument is that the test for whether the two suits arise out of the same transactional nucleus of facts "is clearly not satisfied here because the prior litigation involved rights accruing to the Colville Tribes under the 1855 Yakama Treaty, not the factually distinct transaction leading to the 1894 agreement and subsequent Act of Congress." Colville Mem. at 16. This statement takes too narrow a view of what should be considered the operative facts at issue in this court's prior rulings.

In deciding Colville's 1989 motion to intervene, Judge Marsh was tasked in part with interpreting the 1855 Yakama Treaty. At the time, Colville took the position, as evidenced by its pretrial brief submitted to the court, that all of the other tribes (including Yakama) that were parties to the case had treaty fishing rights, and that Colville merely sought to establish its treaty rights on equal footing with the other tribes. I see no reason why Colville could not have argued as it does now, either as its primary argument, or in the alternative, that in interpreting the Yakama Treaty, Judge Marsh should have looked to the 1894 agreement to determine whether any rights of Yakama were ceded, establishing special fishing rights in the Wenatchi. If it is Colville's position now that the

meaning of the rights set forth in the Yakama Treaty was changed by the 1894 agreement, then the transactional nucleus of facts surrounding the 1894 agreement is absolutely the same nucleus of facts as was before Judge Marsh when he interpreting the Yakama Treaty. The relevant transactional nucleus of facts is Colville's claim of off-reservation fishing rights at Icicle Creek, whether it arose under the Yakama Treaty or the effect of the subsequent 1894 agreement on the provisions of that Treaty.

Colville moved for intervention in this case on the basis that it had off-reservation treaty fishing rights at "usual and accustomed fishing places" pursuant to Article III of the Yakama Treaty. In proposing that Judge Marsh make such a ruling, the Colville put the 1894 agreement before the court as an exhibit, as the subject of extensive expert testimony, and as a stipulation. In the pretrial order submitted to Judge Marsh, Colville made the following stipulation as to the meaning and intent of the agreement:

> In 1896, the United States Government purchased the lands of the Wenatshapam Fishery reserved under Article X of the Yakima Treaty. The funds from that purchase were used to develop the Yakima Indian Reservation irrigation project and to provide direct payment to Wenatchi Indians who lived at or near the Wenatshapam Fishery. The agreement for the purchase of the Wenatshapam Fishery also included provision to allot the Wenatchi Indians living at or near the sale of the Wenatshapam Fishery in the area of the fishery on the Wenatchee river.

This interpretation was adopted as a part of Judge Marsh's ruling. *Oregon,* 787 F. Supp. at 1580. It clearly

makes no mention of special fishing rights to Colville or the Wentachi Band.

Also, in its proposed findings of fact submitted pretrial, Colville specifically asserted that the Colville Wenatchi retained special rights under the agreement. While Colville did not argue that the 1894 agreement was the sole basis for off-reservation rights, Colville urged the court to consider this evidence in making a ruling that Colville had rights based on the Yakama Treaty. The same facts were before Judge Marsh, and the 1894 agreement was even part of Colville's case. As such, it had to present all legal theories related to the agreement at that time. Colville could have chosen not only to assert its claim of treaty rights but also to challenge the rights asserted by Yakama. Why it chose not to do so, I do not know. Perhaps Colville did not want to take the position that the fishery right it was trying to establish was limited to the Wenatchi. It may have been trial strategy not to assert the legal theories Colville asserts now, but these argument [sic] could have readily been made before, and this is what matters for purposes of claim preclusion. Yakama cites to a recent Ninth Circuit decision that sums up the relevant inquiry:

> The fact that res judicata depends on an 'identity of claims' does not mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an issue that has, or could have, been litigated. Rather, identity of claims exists when two suits arise from 'the same transactional nucleus of facts.' Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action. . . . It is immaterial whether the claims

> asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought.

Tahoe Sierra Preservation Council, Inc. v. Tahoe, 322 F.3d 1064, 1077-78 (9th Cir. 2003) (citations omitted).

Colville also argues that Judge Marsh narrowly defined the issues before him. To the extent that Colville implies that Judge Marsh would not have let it argue this new theory, I believe this is an inaccurate view of the way the trial proceeded. Colville is correct that Judge Marsh was careful to note the narrowness of the issues before him:

> First, the issue before me is not whether individual members of the Colville Confederacy "lost" treaty rights by enrolling as Colvilles. Nor is the issue whether the Colville Confederacy should exercise rights on behalf of these bands in the place of the Yakimas and the Nez Perce – the parties expressly agreed that the only factual determination before me is the constituency of the Colville Reservation, and therefore, I make no findings or comparisons as to the number of treaty Indians on the Colville Reservation as opposed to the Yakima or Nez Perce Reservations. Finally, the issue is not whether individuals who reside on the Colville Reservation and who are able to trace their ancestry to treaty signatory tribes may fish, as that is a matter within exclusive tribal jurisdiction and is subject to the rules and regulations of the tribes who exercise such regulatory power.
>
> I find that the issue before me is whether The Confederated Tribes of Colville Reservation may

> exercise authority, as a separate Treaty Tribe, to administer or regulate off-reservation treaty fishing rights based upon the fact that some of its members can trace their ancestry to parties to the Yakima or the Nez Perce Treaties of 1855.

Oregon, 787 F. Supp. at 1565-66. To argue that Colville was prevented from making the argument it now makes begs the question of why Judge Marsh defined the issue in front of him as he did. In several places in Judge Marsh's opinion, he noted that the issue before him was based on the specific claim asserted in Colville's intervention petition, as well as the parties' stipulation as to the specific issue the court was to decide. *Id.* at 1561-62, 1565. Judge Marsh also adopted as findings of the court many of the factual stipulations of the parties. *Id.* at 1561-62, 1572-81. Among the factual stipulations was Colville's stipulation that Yakama had the treaty rights that it now contends have been lost.

I find that Colville is precluded from raising the claims put forward in these proceedings and I will not reach the issues of whether Yakama lost rights under the 1894 agreement and Colville gained the same. I find that Yakama's prevailing on its preclusion arguments satisfies the requirement of obtaining actual success on the merits in order to warrant injunctive relief.

In balancing the equities, I have considered the potential effect on Colville tribal members who consider Icicle Creek to be a traditional fishery. Based on the number of individual tribal members who appeared in court both to testify against the entry of an injunction and to observe the proceedings, I recognize the importance of this issue. I must also consider, however, that Colville's fishing at Icicle Creek may have a significant impact on

Yakama's harvest. Many Yakama tribal members fish only at this fishery, and the fish they catch there have reservation-wide benefits for their extended families. Further, to the extent that allowing a fishery by a group who has no treaty right to fish renders meaningless the treaty rights of Yakama, I must consider the harm of that nature.

As I noted during oral argument, I had hoped that the parties could reach an agreement on this issue. There is a history of broken promises with respect to many of the tribal entities and I am aware that at least at some level, neither side wishes to be in the position we are in today. However, the parties have not been able to reach an agreement on this issue, and Yakama has shown that it is entitled to an injunction. I recognize that I have broad discretion in fashioning the appropriate remedy and that an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled. In *Orantes-Hernandez,* 919 F.2d at 556, the Ninth Circuit upheld the district court's entry of a permanent injunction in part based on the district court's finding that defendants "persist[ently] engag[ed] in conduct violating both the letter and spirit of the preliminary injunction." I find similar considerations important here with respect to Judge Marsh's prior rulings. Even if Colville believes it has a right to fish at Icicle Creek that was not adjudicated by Judge Marsh, just "going fishing" as it were is certainly a violation of the spirit if not the letter of this court's prior rulings. At this point, I believe it appropriate to enter an injunction prohibiting Colville from any such fishing.

CONCLUSION

For the foregoing reasons, Yakama's motion (#2326) is granted. The Confederated Tribes of the Colville Reservation, its constituent tribes, and tribal members are enjoined from fishing on Icicle Creek in any manner not consistent with Washington State law.

Dated this 18th day of August, 2003.

/s/ Garr M. King
Garr M. King
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF OREGON, et al. Defendants. CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION, Appellee, v. CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH PAKOOTAS, Chairman of the Colville Business Council; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE, Spokesman for the Wenatchi Constituent Tribe, Appellants.	No. 03-35773 D.C. No. CV-68-00513-MFM District of Oregon, Portland ORDER (Filed Feb. 28, 2007)

Before: HUG, BERZON, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Berzon and Bybee have voted to deny the suggestion for rehearing en banc and Judge Hug has voted to recommend denial of the suggestion for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and suggestion for rehearing en banc are denied.

APPENDIX D

RESTATEMENT (SECOND) OF JUDGMENTS § 24

DIMENSIONS OF "CLAIM" FOR PURPOSES OF MERGER OR BAR – GENERAL RULE CONCERNING "SPLITTING"

1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

APPENDIX E

TREATY WITH THE YAKIMA, 1855.

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-path, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along main ridge of the Cascade Mountains to the point where the nothern [sic] tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10',) which two latter lines

separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attahnam River; thence westerly along said Attahnam River to the forks; thence along the southern tributary to the

Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided. That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby

ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided.* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this

treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying then with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year, for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one

carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salarly [sic] to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nation, and is recognized as such by them and by the commissioners on the part of the United states holding this treaty; and all

the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence [sic], but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. *And provided.* That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. [L. S.]

Kamaiakun, his x mark. [L.S.]	Wish-och-kmpits, his x mark. [L.S.]
Skloom, his x mark. [L.S.]	Koo-lat-toose, his x mark. [L.S.]
Owhi, his x mark. [L.S.]	Shee-ah-cotte, his x mark. [L.S.]
Te-cole-kun, his x mark. [L.S.]	Tuck-quille, his x mark. [L.S.]
La-hoom, his x mark. [L.S.]	Ka-loo-as, his x mark. [L.S.]
Me-ni-nock, his x mark. [L.S.]	Scha-noo-a, his x mark. [L.S.]
Elit Palmer, his x mark. [L.S.]	Sla-kish, his x mark. [L.S.]

Signed and sealed in the presence of –

James Doty, secretary of treaties,
Mie. Cles. Pandosy, O. M. T.,
Wm. C. McKay,
W. H. Tappan, sub Indian agent, W. T.,
C. Chirouse, O. M. T.,
Patrick McKenzie, interpreter,
A. D. Pamburn, interpreter,
Joel Palmer, superintendent Indian affairs, O. T.,

W. D. Biglow,
A. D. Pamburn, interpreter.

APPENDIX F

53D CONGRESS, 2d Session. } SENATE. { Ex. Doc. No. 67.

IN THE SENATE OF THE UNITED STATES.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

A copy of an agreement with the Yakima Nation of Indians, and a draft of a bill to ratify the same.

DEPARTMENT OF THE INTERIOR,
Washington, March 19, 1894.

A BILL to ratify and confirm an agreement with the confederated tribes and bands known as the Yakima Nation of Indians, in the State of Washington, and to make an appropriation for carrying the same into effect.

Whereas John Lane, special United States Indian agent, and Lewis T. Erwin, United States Indian agent, duly appointed commissioners on the part of the United States, did, on the eighth day of January, eighteen hundred and ninety-four, conclude an agreement with certain tribes and bands of Indians, all constituting what is known as the Yakima Nation of Indians, by their chiefs, head men, and principal men, embracing a majority of all male adult Indians belonging to the said nation of Indians upon the Yakima Reservation, in the State of Washington, which said agreement is as follows:

Whereas John Lane, special U. S. Indian agent, and Lewis T. Erwin, U. S. Indian agent for the Yakima Indian Agency, duly appointed commissioners on the part of the United States, did on the eight day of January, 1894, conclude an agreement with the following tribes and bands of Indians, viz: Yakimas, Palouses, Pisquouses, Wenatshapams, Kliekitats, Klingnits, Kon-was-say-us, Liay-was, Skinpahs, Wish-hams, Shy-iks, Oehe-chotes, Kah-milt-pahs, and Se-ap-cats, all constituting what is known as the Yakima Nation of Indians, by their chiefs, headmen and principal men, embracing a majority of all the male adult Indians belonging to the Yakima Nation of Indians aforesaid, which said agreement is as follows:

Whereas a certain right of fishery was duly provided for in Article ten of the treaty concluded with these Indians by the United States in the year 1855, and ratified by Congress on March 8, 1859, which said article reads as follows, to wit:

"ARTICLE 10. *And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam Fishery,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations;" and

Whereas a certain tract of land was duly surveyed and set apart in the year 1893 by the United States in fulfillment of the agreement on the part of the United States, to be performed as set forth in said article 10 of said treaty of

1855 as aforesaid, which said tract of land is known as the Wenatshapam Fishery, and is described as follows, to wit:

"*And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the Wenatshapam Fishery, which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations;" and

Whereas the said Indians have found the said right of fishery, and the said fishery above described, of little use or benefit to them, and are willing to dispose of the same to the United States: Therefore, in order to carry out such purpose, it is hereby agreed as follows:

ARTICLE I.

The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature, of, in, and to all their right of fishery, as set forth in article 10 of said treaty aforesaid, and also all their right, title, interest, claim, or demand of, in, and to said land above described, or any corrected description thereof, and known as the Wenatshapam Fishery.

ARTICLE II.

In consideration of the foregoing cession and relinquishment the United States hereby agrees to pay or expend through their Indian agent, Yakima Agency,

twenty thousand dollars, which said sum is to be deposited in a United States depository for their use and benefit, as soon as approved by Congress, and subject to their order, the Indians reserving the right to dispose of said money as they may decide in general council, to be held by them and for that purpose. After the ratification of this agreement by Congress, and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty, in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law.

ARTICLE III.

This agreement shall not be binding upon either party until ratified by Congress. Dated and signed at Fort Simcoe, Yakima Agency, Washington, January 8, 1894.

JOHN LANE, [SEAL.]
Special U.S. Indian Agent,
LEWIS T. ERWIN, [SEAL.]
U.S. Indian Agent, Yakima,
Commissioners.

* * *

The foregoing article of agreement having been fully explained to us in open council we, the undersigned, chiefs, headmen, and principal men of the several tribes and bands composing the Yakima Nation of Indians in the State of Washington, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals at Yakima Agency, Washington, this eighth day of January, eighteen hundred and ninety-four.

Joe Stwire, his x mark, seal; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

For the purpose of carrying this agreement and ratification into effect, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of twenty thousand dollars, to be paid to the Indian agent of the Yakima Indian Agency, to be expended by him as provided in the second article of said agreement, in such manner and in such sums as may be decided upon by the general council of the Yakima Nation of Indians, convened and held for that purpose. And the land so ceded and relinquished is hereby restored to the public domain, subject to the land laws of the United States: *Provided*, That the Indians, known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall be allowed the privilege of taking allotments of land in severalty under the fourth section of the general allotment Act of eighteen hundred and eighty-seven, and amended Act of eighteen hundred and ninety-one, as contemplated by the second article of said agreement: *And provided further*, That it shall be the duty of the Indian agent of the Yakima Indian Agency to see that the Wenatshapam and other Indians living on the Wenatchee River, State of Washington, shall receive and have paid to them their full and pro rata share of said moneys.

* * *

APPENDIX G

25 U.S.C. § 334. Allotments to Indians not residing on reservations

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act: for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office [Secretary of the Interior or such officer as he may designate], and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

(Feb. 8, 1887, ch 119, § 4, 24 Stat. 389.)

APPENDIX H

2007-256

EMERGENCY RESOLUTION

WHEREAS, it is the recommendation of the Natural Resources Committee that the Colville Business council approve the attached Resolution to open a 2007 Spring Chinook, fishing season at the Wenatshapam Fishery to Colville Wenatchi and to provide for the adoption of regulations and enforcement for this fishery.

THEREFORE, BE IT RESOLVED, that we, the Colville Business Council, by authority of Resolution 1991-431 (10 affirmative signatures on this recommendation sheet, an emergency) this 30th day of April, 2007, acting for and in behalf of the Colville Confederated Tribes, Nespelem, Washington, do hereby approve the above recommendation of the Natural Resources Committee.

The foregoing was duly enacted by the Colville Business Council by a vote of **10 FOR 0 AGAINST 0 ABSTAINED**, under authority contained in Article V, Section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs in April 19, 1938.

ATTEST:

/s/ Michael Marchand
Michael Marchand,
Chairperson
Colville Business Council

cc: Natural Resources Committee Chair
CBC Administrative Assistant
BIA Superintendent
Dept. or Program Steve Suagee, ORA

Resolution No. ___

Whereas an 1894 Agreement with the United States and ratified by Congress recognizes and preserves the right of the members of the Wenatchi Constituent Tribe of the Colville Reservation (hereafter "Colville Wenatchi") to fish at the Wenatshapam Fishery located at the Leavenworth National Fish Hatchery on Icicle Creek (hereinafter "Wenatshapam Fishery"), and

Whereas an injunction to prohibit such fishing by members of the Colville Wenatchi that was issued by the federal district court in 2003 has been overruled by the Ninth Circuit Court of Appeals and is no longer in effect, and

Whereas under the 1894 Agreement members of the Colville Wenatchi Constituent Tribe have the right to fish at the Wenatshapam Fishery during the 2007 Spring Chinook fishing season, and it is expected that they will do so,

Whereas it is anticipated that members of the Yakama Nation who have fished at the Wenatshapam Fishery in the past will continue to do so during the 2007 Spring Chinook fishing season, notwithstanding the fact that the Yakama Nation ceded its fishing rights to the Wenatshapam Fishery in the 1894 Agreement, and

Whereas members of the Colville Wenatchi and members of the Yakama Nation in the past have jointly fished at the Wenatshapam Fishery in a peaceable manner, and

Whereas it is in the interests of the Confederated Tribes of the Colville Reservation and in the Interests of the members of the Colville Wenatchi that fishing by members of the Colville Wenatchi at the Wenatshapam Fishery during the 2007 Spring Chinook fishing season take place in an orderly manner subject to regulation by the Colville Tribes,

Now therefore be it resolved:

1. Pursuant to the Fish and Wildlife Code, Chapter 4-1-180 of the Colville Tribal Code, the Colville Tribes hereby establishes a 2007 Spring Chinook fishing season at the Wenatshapam Fishery. This fishery shall be consistent with the dates and requirements set by the United States Fish and Wildlife Service (USFWS) in consultation with the Washington Department of Fish and Wildlife (WDFW) for the Icicle Creek fishing season. The Colville Tribes' Fish and Wildlife Department is authorized and directed to carry out all fishery management coordination activities with USFWS and WDFW associated with this fishery.

2. The Colville Wenatchi are the only members of the Colville Tribes who are permitted to fish at the Wenatshapam Fishery. The Tribal membership office shall issue identification cards to the members of the Colville Wenatchi. Such cards shall be used to identify Colville Wenatchi for purposes of fishing rights at the Wenatshapam Fishery.

3. Fishing at the Wenatshapam Fishery by the Colville Wenatchi shall be for traditional and subsistence use only.

4. The legal fishing gears for salmon and steelhead are dipnets, set nets, weirs, or rod and reel with bait or lures having single hooks. Double or treble hooks are prohibited. Any other fishing methods, such as snagging of fish, are unlawful. It shall be unlawful to place fishing platforms or to injure salmon and steelhead within 30 feet of any fish ladder, fishway or fish bypass pipes associated with irrigation canal fish screening structures. Fishing is not allowed from boats or any other floating devices.

5. It shall be unlawful for any Wenatchi Colville to obstruct or interfere with the fishing by any other person, including members of the Yakama Nation, who are also fishing at the Wenatshapam Fishery, and it shall be unlawful to disturb or remove any scaffolding or other structures that have been or will be erected at the Wenatshapam Fishery by any person.

6. All laws of the Colville Tribes that apply to the conduct of tribal members when exercising tribal rights shall apply to Wenatchi Colville while engaging in fishing activities for this season.

7. The personnel of the Fish and Wildlife Department of the Colville Tribes, and other law enforcement personnel of the Colville Tribes, are authorized and directed to enforce these rules at the Wenatshapam Fishery.

CERTIFICATION

On April ___, 2007, this resolution was approved at a duly called Tribal Council meeting, a quorum being present by an affirmative vote ___ members, ___ opposing, and ___ abstaining, this ___ day of April, 2007.

_____	_____
Secretary	Chairman

APPENDIX I

No. 03-35773

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.

Plaintiff,

v.

STATE OF OREGON, et al.

Defendants.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH A PAKOOTAS, Chairman of the Colville Business Council; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE, Spokesman for the Wenatchi Constituent Tribe,

Appellants,

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE APPELLANTS

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* * *

Court considered a union's appeal of a district court judgment upholding an employer's claim of defamation. Defamation claims in the labor context are governed by a three-part test in which each element must be satisfied in order to sustain the claim. *Id.* at 1004. The union on appeal questioned whether the first element was satisfied. The employers objected that the issue was raised for the first time on appeal. The court held that the Union was making "legitimate legal arguments about existing issues" not raising new issues on appeal. *Id.* at 1005. The exact same is true here. The court below ruled that the Appellants are barred by the doctrine of res judicata. Privity is a part of "legitimate legal arguments about existing issues" – the application of res judicata to the Appellants in this instance.

Privity is also relevant, and lacking here. As we explained, Appellants' Br. at 33-37, Colville as a unit sought to be the successor to all treaty rights of some of its constituent tribes for the benefit of all its members – which would have resulted in all Colville tribal members having a right to fish at the Wenatchi site. By contract,

the Wenatchi rights, assuming *arguendo* that they *could* have been put forth in the earlier action, would have preserved only Wenatchi fishing rights. Because the Confederated Tribes of the Colville Reservation did not represent "precisely the same right in respect to the subject matter involved," *Stratosphere Litigation L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002), and because it as a parent organization did not "adequately represent the interests of its individual members," *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003), the element of privity necessary to invoke res judicata has not been satisfied.

Apparently, Yakama also argues that although it specifically named the Wenatchi Constituent Tribe as a party defendant in its motion for an injunction, the Constituent Tribe does not exist as a separate entity for purposes of asserting a lack of privity, Yakama Mem. at 16-20. While the Wenatchi are, of course, not an independent federally recognized tribe (which no one has claimed), this Court has specifically recognized that it is a Constituent Tribe that retained "identifiable cultural and political characteristics," 29 F.3d at 485, when it joined the Confederated Tribes of the Colville Reservation.

Moreover, members of the Wenatchi Tribe were given the right to allotments at the Wenatshapam fishery by the 1894 Agreement, and some of them still hold those allotments. It is thus clear that a member of the Wenatchi Constituent Tribe can have rights that are not held by members of the other constituent tribes of the Colville Confederation. Colville certainly has the right to defend these rights. And the defendants that Yakama specifically named in its injunctive action "Wenatchi Constituent

Tribe: John St. Pierre, Spokesman for the Wenatchi Constituent Tribe" (*See* title of this action) – certainly have the right to defend themselves by showing they have a Congressionally approved fishing right, whether Colville defended them previously or not.

Moreover, it is common for constituent tribes of a confederacy of tribes to retain rights belonging to them and not to other members of the confederation. For instance, the Assiniboine and Sioux Tribes of the Fort Peck Reservation are listed as one federally recognized Indian tribe. 68 Fed.Reg. 234 (2003). However, both the Assiniboine and the Sioux have been able to bring separately treaty or trust actions against the United States. *See United States v. Assiniboine Tribe of Indians*, 428 F.2d 1324, 1329-1330 (Ct. Cl. 1970) (Claims of Assiniboine of Fort Peck and Fort Belknap upheld in a suit against the United States for compensation for ceded land). Similarly, the Sioux of Fort Peck have brought actions against the government in their own name. *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980) (Recovery granted to various Sioux tribes for loss of the Black Hills).

CONCLUSION

The Wenatchi did not receive the reservation promised them because the United States failed to survey it. Yakama gave up its rights to that land and fishery, and the Wenatchi were promised allotments there, and, it was understood, fishing rights, in an agreement signed by Yakama and approved by Congress. The Wenatchi

* * *

FILED
JUN 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1588

IN THE

Supreme Court of the United States

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
Petitioners,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH PAKOOTAS; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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June 27, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the court below correctly held that res judicata does not apply to bar an Indian tribe's claim for fishing rights asserted under an 1894 Agreement with the United States, when that claim was not, and could not have been, litigated in an earlier proceeding that adjudicated whether the tribe had fishing rights under a separate 1855 treaty?

2. Whether this Court should deny review where petitioner now asserts an argument on judicial estoppel that was neither asserted nor decided below?

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IN THE

Supreme Court of the United States

No. 06-1588

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Petitioners,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH PAKOOTAS; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1a-19a) is reported at 470 F.3d 809 (9th Cir. 2006). The decision of the district court (Pet. App. 20a-36a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 2006. A petition for rehearing was denied on February 28, 2007 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on May 29, 2007 and docketed on

May 31, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The background to this case is a dispute over whether an 1894 Agreement between the Yakama Nation and the United States provides certain fishing rights to the Wenatchi Indians, who are now a constituent tribe of the Confederated Tribes of the Colville Reservation. In 2003, the district court enjoined fishing by the Wenatchi at their ancestral fishing station, holding that they are barred by res judicata from asserting any rights under the 1894 Agreement because the Colville Tribes in an earlier proceeding had unsuccessfully asserted a claim for fishing rights under a separate 1855 Treaty. The Court of Appeals for the Ninth Circuit reversed, holding that res judicata does not apply because the district court in the earlier proceeding had imposed conditions that precluded Colville from asserting the rights of the Wenatchi under the 1894 Agreement.

The res judicata ruling below raises no novel or substantial questions. It was issued by a unanimous panel, and not a single judge on the Ninth Circuit voted for rehearing en banc.

The ruling raises no conflict between the Ninth Circuit and other Circuits regarding the appropriate standard for claim preclusion, nor does the Ninth Circuit's decision conflict with the *Restatement (Second) of Judgments* (1982). Even if it did, any such conflict with a secondary source is not a reason for review by this Court.

Yakama also urges the Court to grant review to determine if the Colville defendants should be barred under the doctrine of judicial estoppel. This argument was neither made below nor addressed by the Ninth Circuit. Moreover, it raises no novel or substantial questions, and is wrong on the merits.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background.

In Article 10 of the Treaty of 1855 with the Yakama Nation, 12 Stat. 951 (June 9, 1855) (Pet. App. 40a-49a), the Wenatchi Indians were provided a six square mile reservation located at Wenatshapam, their traditional fishery at the confluence of Icicle Creek and the Wenatchee River in the State of Washington. *United States v. Oregon*, 470 F.3d 809, 811 (9th Cir. 2006) (Pet. App. 5a). The United States failed in its obligation to survey and set aside the Wenatchi reservation, and non-Indian settlers and a railroad company progressively made encroachments upon the land. *Id.* at 811-12 (Pet. App. 5a-7a). When a survey was finally undertaken in 1893, a U.S. Indian Agent directed the surveyor to locate the reservation far from its intended location at the Wenatshapam fishery, in an apparent effort to placate the white settlers who opposed the reservation. *Id.* at 812 (Pet. App. 6a). The mis-surveyed reservation was of no use to the Wenatchi, and rather than locate the reservation correctly, the United States instead determined to buy it from the Indians. *Id.* (Pet. App. 6a-7a.)

Negotiations were held in the winter of 1893-94, culminating in an agreement, ratified by Congress in 1894, for the Yakama Nation to sell the Article 10 reservation to the United States for $20,000. Agreement with the Yakima Nation of Indians in Washington, 28 Stat. 320 (1894) ("1894 Agreement") (Pet. App. 50a-54a). The Agreement also promised the Wenatchi that they would receive allotments of land at Wenatshapam, where they lived, and a non-exclusive right to fish there. *Id.*

The United States again failed in its obligations to the Wenatchi, allotting only a handful of the dozens of promised allotments. The tribe fell into poverty, and the United States eventually moved most members to the Colville Reservation,

where they became the Wenatchi Constituent Tribe of the Confederated Tribes of the Colville Reservation.

B. Procedural History.

United States v. Oregon was first filed in 1968 to determine Indian off-reservation fishing rights in the Columbia River and its tributaries. The United States, on behalf of certain Indian tribes, asserted those tribes had rights to fish at "all usual and accustomed places" under the 1855 Treaty with the Yakama Nation (and also under the Treaty of 1855 with the Nez Percés, 12 Stat. 957 (June 11, 1855)).

In 1989, the Colville Tribes, a tribal confederation organized under an 1872 Executive Order (Exec. Order of April 9, 1872) sought to intervene in the case on behalf of five of its constituent tribes (including the Wenatchi) that were parties to the 1855 treaties, in order to participate in the management of the Columbia River fishery. *See United States v. Oregon,* 787 F. Supp. 1557 (D. Or. 1992). The district court (the Hon. Malcolm F. Marsh) "made it clear that Colville had to establish, as a condition to intervention, *treaty rights* under the 1855 treaties." 470 F.3d at 815 (Pet. App. 13a). The district court ultimately denied intervention, finding that Colville had failed to show it was "'the present day holder of *treaty rights.*'" 470 F.3d at 814 (Pet. App. 11a) (quoting *United States v. Oregon,* 787 F. Supp. at 1572). The Ninth Circuit affirmed, holding that the Colville Tribes did not have treaty fishing rights under the 1855 Treaty. *United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994), *modified*, 43 F.3d 1284 (9th Cir. 1994).

The Wenatshapam fishery is now the site of a federal fish hatchery. The hatchery in recent years has allowed local Indians to catch fish surplus to the hatchery's needs. During the 2003 spring fishing season, Yakama sought an injunction against the Colville Wenatchi to bar their fishing at Wenatshapam, claiming that Yakama has exclusive rights to

fish at that station.[1] The Colville defendants argued in response that the Wenatchi had fishing rights at Wenatshapam secured by the 1894 Agreement.

The district court (the Hon. Garr M. King) held that the Colville defendants were precluded from asserting a defense to the injunction based on their rights under the 1894 Agreement, because those rights could have been, but were not, asserted in the prior intervention proceedings. *United States. v. Oregon*, No. 68-513-KI, slip op. (D. Or. Aug. 18, 2003) (Pet. App. 20a-36a). In so ruling, Judge King discounted the express condition on intervention—that the Colville prove 1855 *treaty* rights—that had been imposed by Judge Marsh. *Id.* at 9-11 (Pet. App. 30a-34a). The district court granted a permanent injunction against Colville Wenatchi fishing at the tribe's traditional fishery, without reaching the meaning or effect of the 1894 Agreement. *Id.* at 12 (Pet. App. 34a).

The Colville defendants appealed to the Ninth Circuit. That court unanimously held that the question of whether the 1894 Agreement provided fishing rights to the Wenatchi was not decided, *and could not have been decided*, in the intervention case because of the conditions on intervention imposed by Judge Marsh. 470 F.3d at 815-17 (Pet. App. 13a-17a). The court found that the proceeding in which Colville tried to intervene was "expressly limited to the adjudication of the 1855 Treaty rights," *id.* at 816 (Pet. App. 15a), and that "[t]he 1855 Treaty and the 1894 Agreement . . . present entirely different transactional nuclei." *Id.* The Ninth Circuit therefore held that the Colville defendants are not now precluded from asserting rights under the 1894 Agreement, and remanded the case for the district court to adjudicate the rights conferred by the 1894 Agreement, an issue never

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[1] Yakama filed a similar motion a year earlier, in 2002, but ultimately withdrew it.

before resolved by any court. Referring to the effect on the Wenatchi of the res judicata bar imposed by the district court, the Ninth Circuit said, "[t]hrough unfulfilled promises and procedural rulings, they would, under that ruling, lose both the land they were guaranteed adjacent to the fishery and their fishing rights." *Id.* at 813 (Pet. App. 9a).

Yakama's petition for rehearing and suggestion for rehearing en banc was denied on February 28, 2007, without any votes in favor (Pet. App. 37a-38a).

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF THE "TRANSACTIONAL NUCLEUS" TEST IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The gravamen of Yakama's petition is its claim that the Ninth Circuit applied a "pinched construction" of the transactional nucleus of facts test (Pet. 15), whereas section 24 of the *Restatement (Second) of Judgments* and the circuits that follow it allegedly apply a "broader" construction. (Pet. 12.) However, the cases cited by Yakama do not bear out its contention that there is a conflict between circuits as to the breadth of the test.

The overriding consideration in an analysis of claim preclusion is whether the party to be precluded had a "full and fair opportunity" to litigate its claim in the earlier litigation. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 n.22 (1982). The Ninth Circuit based its ruling on its finding that Judge Marsh's conditions on intervention had entirely foreclosed Colville from litigating rights under the 1894 Agreement in the intervention proceeding. 470 F.3d at 817 (Pet. App. 18a) ("The rights of the Wenatchi Tribe under the 1894 Agreement were not litigated, nor could they have been brought in that proceeding because, as we have discussed, the

condition for intervention was not met."); *id.* at 818 (Pet. App. 18a).

Although this consideration alone was sufficient to dispose of Yakama's claim preclusion argument, the Ninth Circuit also considered Yakama's contention that Colville's claim of fishing rights for the Wenatchi at Icicle Creek under the 1894 Agreement could have been raised in the intervention proceeding because that Agreement was part of the same transactional nucleus of facts as the Colville claim of off-reservation fishing rights for its members under the 1855 Treaty. The court considered the history of the two documents, 470 F.3d at 811-13 (Pet. App. 3a-9a), and correctly concluded that the Treaty and the Agreement presented "entirely different transactional nuclei." 470 F.3d at 816 (Pet. App. 15a). The court noted that the Treaty and the Agreement were different documents, entered into almost four decades apart, providing different rights, and that the latter was not set forth as an amendment to the former, but rather as an entirely new agreement. *Id.* at 811-13, 816 (Pet. App. 3a-9a, 14a-15a).

As the court's evaluation of the "independen[ce]" of the two documents indicates, *id.* at 816 (Pet. App. 15a), the Ninth Circuit has adopted the pragmatic transactional test set forth in section 24 of the *Restatement* (*Second*).[2] Despite failing to argue (or even to cite) the section 24 factors to the Ninth Circuit,[3] Yakama now complains that "the court below completely failed to use the proper factors for determining a

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[2] *E.g., Sidney v. Zah*, 718 F.2d 1453, 1459 (9th Cir. 1983) (citing transactional approach of section 24 with approval and noting that whether the claim "arise[s] out of the same 'transactional nucleus of facts' [is] the criteria most stressed in our decisions").

[3] Section 24 is not cited even once in Yakama's merits brief below, and it appears in Yakama's petition for rehearing only as a parenthetical embedded in a case citation inside a block quote. (*See* Yakama Pet. for Reh'g 6.)

'series' of transactions—whether they are related 'in time, space, origin, or motivation . . . .'" (Pet. 14-15 (quoting *Restatement* (*Second*) § 24(2))). Yakama also failed to make this "series" argument below, contending instead that the 1855 Treaty and the 1894 Agreement were parts of the *same* transactional nucleus, not a "series" of transactions under section 24.[4] Nevertheless, the Ninth Circuit's decision is entirely consistent with the *Restatement* (*Second*) "series" approach as applied by other circuits.

The decision below is consistent with the Tenth Circuit's decision in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), cited by Yakama, which found plaintiff Petromanagement's second suit barred by claim preclusion under the "series" approach of section 24. *Id.* at 1336. There, the parties entered into an oil and gas exploration option agreement that had a model turnkey drilling contract and a model operating agreement attached as exhibits to the option agreement. Five wells were drilled under the option agreement, with individual turnkey and operating contracts for each well.

In its first complaint, Petromanagement alleged that the defendants had failed to meet their contractual obligations under the option agreement. In its second complaint, filed shortly before the first action was to go to trial, Petromanagement alleged that it had been fraudulently induced to enter into the individual contracts for each of the five wells. After its motion to consolidate the two actions was denied, Petromanagement stipulated to a dismissal with prejudice of its first suit, and the trial court then granted the defendants' motion to dismiss the second suit due to claim preclusion. *Id.* at 1332.

The Tenth Circuit's decision is not in conflict with the Ninth Circuit's decision here, for multiple reasons. First, in

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[4] *See* Yakama Merits Brief 29, 32; Yakama Pet. for Reh'g 4-5.

holding the second suit barred, the Tenth Circuit noted that under section 24, "a contract is generally considered to be a transaction." *Id.* at 1336 (internal quotation marks omitted). The court reasoned that "even if the severable parts of a divisible contract are considered separate transactions, we believe their *presence within the same document* is sufficient for claim preclusion under the 'series of connected transactions' language of § 24." *Id.* (emphasis added). In the case at hand, by contrast, there is no question that the 1855 Treaty and the 1894 Agreement are entirely separate documents and separate agreements. Indeed, the 1894 Agreement is not even an amendment to the 1855 Treaty. 470 F.3d at 812, 816 (Pet. App. 7a, 15a).

Second, although this factor is not explicitly discussed by either court, the option and the model contracts in *Petromanagement* were identical in time,[5] the factor listed first in section 24(2) as a consideration in determining what constitutes a "transaction" or a "series." In the case at bar, however, the Treaty and the Agreement were separated by thirty-nine years and thus reflected different eras in federal Indian policy; were negotiated, drafted, and signed by different individuals; and were subject to different pressures and motivations.

Finally, so far as appears from the *Petromanagement* opinion, there was no particular reason why the plaintiff failed to bring all of its claims in the first action. The Colville defendants, on the other hand, were prevented from doing so by Judge Marsh's conditional intervention order which, as the Ninth Circuit found, required the Colville defendants to establish rights under the 1855 Treaty, not the 1894 Agreement. 470 F.3d at 815 (Pet. App. 13a) ("In order to intervene in the action . . . , Judge Marsh made it clear that Colville had to

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[5] Accordingly, the option and model contracts should not be characterized as "successive contracts," as Yakama terms them. (Pet. 12.)

establish, as a condition to intervention, *treaty rights under the 1855 treaties*." (emphasis partially added)).

Nor does the Ninth Circuit's decision conflict with the other Tenth Circuit case cited by Yakama. In *King v. Union Oil Co.*, 117 F.3d 443 (10th Cir. 1997), an employment case, the plaintiff's first complaint alleged discriminatory termination and the second complaint alleged the unlawful failure to pay severance benefits. The court found that the termination and the later denial of benefits were related transactions, based on, among other factors, their close proximity in time (within a four month period) and the substantial overlap of related facts. *Id.* at 445. For that reason, the Tenth Circuit found that claim preclusion applied to the plaintiff's failure to litigate the benefits claim as part of the first action on discriminatory termination.

The difference in result between the Ninth Circuit's decision here, and the Tenth Circuit's decisions in *Petromanagement* and *King*, does not illustrate a conflict in law or analysis, but rather the inevitable differences in applying the same legal standards to very different fact patterns.

Nor does the Ninth Circuit decision here conflict with any decision of the Eleventh Circuit. In *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265 (11th Cir. 2002), cited by Yakama, the plaintiff was barred by res judicata from bringing a second lawsuit alleging breach of a "Termination Amendment" to a contract litigated in the first lawsuit. The Eleventh Circuit held that the provision at issue in the second case "was an amendment to [the original] contract—not a separate contract." 299 F.3d at 1270 n.3. Because the provision was not "an entirely separate contract for res judicata purposes," *id.*, the court held that the plaintiff should have brought those claims in the first suit.

By contrast here, as already noted, the Ninth Circuit specifically held that the 1894 Agreement was not an amendment

to the 1855 Treaty, but an entirely separate agreement. 470 F.3d at 812, 816 (Pet. App. 7a, 15a). Moreover, in *Trustmark*, the original contract and the amendment were separated by at most four years (1994 to 1998), whereas in the case here the separation is closer to four decades. Also, the plaintiff in *Trustmark* had every opportunity in the first case to have raised the claims it brought in the second case, but failed to do so in a timely fashion. *Trustmark Ins. Co. v. ESLU, Inc.*, No. 6: 99-cv-1207-ORL-22JGG, slip. op. at 3 (M.D. Fla. April 13, 2001). Here, the Colville defendants had no such opportunity; indeed, they were expressly barred by the district court in the first suit from raising their claims under the 1894 Agreement.

Thus, the decision below is not in conflict with the application of section 24 of the *Restatement* (*Second*) by other circuit courts.[6] And therefore it follows that the decision here is not in conflict with section 24 itself. Indeed, as the comparison of the *Oregon* and *Petromanagement* decisions showed, both decisions were equally faithful to section 24.

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[6] The Colville defendants do not understand Yakama to argue (nor could it reasonably argue) that the Ninth Circuit's decision is in conflict with *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990), which Yakama quotes simply to summarize the policy reasons informing the section 24 approach. (Pet. 13-14.)

United States v. Cunan, 156 F.3d 110 (1st Cir. 1998), and *Manego v. Orleans Bd. of Trade*, 773 F.2d 1 (1st Cir. 1985), are First Circuit decisions cited by Yakama for the proposition that the test under the section 24 approach is not whether the legal theory is different in the second action but whether the factual basis is essentially, even if not exactly, the same. (Pet. 12.) The facts of these two cases are not such that they support Yakama's new argument that the 1855 Treaty and the 1894 Agreement are a series of connected transactions, and the Colville respondents do not argue that a difference in legal theory suffices to avoid claim preclusion.

II. IT IS UNNECESSARY AND INAPPROPRIATE FOR THE COURT TO ADDRESS WHETHER THE *RESTATEMENT* (*SECOND*) EMPLOYS A "PRAGMATIC TRANSACTIONAL TEST."

Yakama's first question presented, whether section 24 of the *Restatement* (*Second*) "uses a pragmatic transactional test" in determining whether a claim is precluded (Pet. i), is not an appropriate question for decision by this Court. *See* Supreme Court Rule 10. In any event, the Court has already characterized section 24's approach as "pragmatic." *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983). Further, the type of test employed by section 24 of the *Restatement* (*Second*) was not an issue in this case below (indeed, Yakama did not rely on section 24 in the Ninth Circuit), and as explained above (see Part I, *supra*), the Ninth Circuit's decision is entirely consistent with that test. However, the Colville defendants do take issue with Yakama's characterization of the section 24 test as causing a "revolution," (Pet. 11), in the law of claim preclusion and as being "much broader in scope than past standards . . . ." (Pet. 12.) Indeed, in discussing the tests set forth in the *Restatement* and the *Restatement* (*Second*), this Court in *Nevada* found it unnecessary to "parse any *minute differences* which these differing tests might produce . . . ." 463 U.S. at 131 (emphasis added). The Court also pointed out that "the result would be the same under either version of the Restatement of Judgments . . . ." *Id.* at 130 n.12. This is hardly the stuff of revolutions.

Moreover, the Court in *Nevada* indicated, at least with respect to the first *Restatement* and presumably by extension with respect to the second, that the test put forth by the *Restatements* is not the only acceptable test for applying claim preclusion. 436 U.S. at 130 n.12 (stating and illustrating that the "same evidence" standard of the first *Restatement* was not the only standard in use). In the present case, the Ninth Circuit did in fact apply an analysis that is entirely

consistent with that of the *Restatement* (*Second*) to reach the correct result.

III. YAKAMA'S JUDICIAL ESTOPPEL ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

For three reasons, Yakama's argument that the Colville defendants should be judicially estopped does not merit attention from this Court.

First, Yakama never argued the doctrine of judicial estoppel to the Ninth Circuit—not in its merits brief and not in its petition for rehearing. This Court does not ordinarily consider arguments neither raised nor addressed below. *E.g.*, *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, __ U.S. __, 127 S. Ct. 1199, 1207 (2007); *TRW Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001). This alone is sufficient basis to reject Yakama's estoppel argument.

Second, Yakama does not even allege that its judicial estoppel argument raises a novel or substantial question or otherwise satisfies any of the considerations for review identified in Supreme Court Rule 10. Given this, the argument does not deserve the attention of this Court.

Third, Yakama's estoppel argument fails on its merits. Yakama is incorrect in claiming that the Colville defendants have changed position on whether it is the Colville tribal government or the Wenatchi Constituent Tribe that is entitled to take legal action to assert rights under the 1894 Agreement. *Compare* 470 F.3d at 813 (2006) (Pet. App. 9a) ("Colville, on behalf of its constituent tribe, the Wenatchi, defends on the ground of rights granted to the Wenatchi by the 1894 Agreement . . . ." (emphasis added)) *with United States v. Oregon*, 29 F.3d 481, 483 (9th Cir. 1994) ("It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes . . . ."), *modified by* 43

F.3d 1284 (9th Cir. 1994). There is no inconsistency between Colville's position in 1994 and its position today.[7]

So too, Yakama's assertion that the Colville defendants have changed positions as to whether the 1894 Agreement grants fishing rights to the Wenatchi is without merit. Yakama's citation to the agreed facts in the intervention proceeding (Pet. 19-20) shows only that, in the different context of litigating intervention, there was "no mention" (Pet. 20) of the 1894 fishing rights at Wenatshapam. Because Judge Marsh's conditions on intervention prevented Colville from litigating any particular source of rights until it first had established a general 1855 Treaty right, silence as to the rights stemming from the 1894 Agreement was an appropriate (indeed, mandated) course then. But silence does not merit a finding of estoppel. *See Zedner v. United States*, ___ U.S. ___, 126 S. Ct. 1976, 1987 (2006) ("'First, a party's later position must be *clearly inconsistent* with its earlier position.'" (emphasis added) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001))). *Accord Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (noting estoppel applies "to bar a party from making a *factual assertion* in a legal proceeding which *directly contradicts* an earlier assertion . . . ." (emphasis added) (*cited in New Hampshire*, 532 U.S. at 750))).

Thus, Yakama's estoppel argument fails on its merits, was not raised below, and does not satisfy the standard for review by this Court.

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[7] It should also be noted that Colville and the Wenatchi were *defendants* in the action below, because it was *Yakama* who designated the Wenatchi Constituent Tribe as a named party.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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